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FUNDAMENTAL RIGHTS and CONSTITUTIONAL REMEDIES

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(Ex-Governor, Member of the Constituent Assembly)

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CONTENTS VOLUME TWO

Pages

CHAPTER V

Constitutional Protections

573—751

Article 20

Protection in Respect of Conviction for Offence	..	573
Foreign Constitutions	574
Ex post facto Law	579—590
Clause (1)	586
Commentary on Foreign Constitution	..	591—604
Clause (2)	593
Section 403. Cr. P. C.	604
Protection against self-incrimination	608—625
Clause (3)	

Article 21

Protection of Life and Liberty	625—660
Foreign Constitutions	625
Supremacy of Parliament	636
Procedure established by Law	647
Judicial Interpretation	653

Article 22

Protection against Arrest and Detention	660—752
Foreign Constitutions	661
Indian Law compared	668
Salient points under Article 22	673
Clause (1)	680—689
Legal Aid Systems in England and America	..	681
Legal Aid Systems in India	683
Clause (2)	689—693
Clause (3)	693—694
Clause (4)	694—701
Advisory Board	695
Clause (5)	701—726
Earliest opportunity of Representation	703
Grounds	704—726
Vague	705
Insufficient	709
Clause (6)	726—729
Clause (7)	729—731
The Detention Act and Statutory Amendments	..	733

	<i>Pages</i>
Jammu and Kashmir P. D. Act	745
Leading Cases of J. & K.	750

CHAPTER VI

Right Against Exploitation 752—760**Article 23**

Prohibition of Traffic in Human Beings and Forced Labour	752—757
Foreign Constitutions	752
Judicial Interpretation	757

Article 24

Prohibition of Employment of Children in Factories etc. ..	758—760
Foreign Constitutions	759
India	759
Legislative Powers	760

CHAPTER VII

Right to Freedom of Religion**Article 25**

Freedom of Conscience and Free Profession etc. of Religion	761—805
Foreign Constitutions	761—789
Extent of Freedom	761
Clause (1)	767
Scheme of Articles 25 to 28 and History of Religious Freedom	773
Clause (2)	777
Temple Entry Legislations	778
	785

Article 26

Freedom to Manage Religious affairs	789—796
Foreign Constitutions	789
Judicial Interpretation	792

Article 27

Freedom as to payment of Taxes for Promotion of Religion	796—802
Foreign Constitutions	797
India—Judicial Interpretation	801

Article 28

Freedom as to attendance of Religious Institution or Worship	802—805
Foreign Constitutions	802
India	803

CHAPTER VIII

Cultural and Educational Rights .. 805—818**Article 29**

Protection of Interests of Minorities	806—814
Foreign Constitutions	806
India—Judicial Interpretation .. .	810

Article 30

Right of Minorities to Establish and Administer	
Educational Institutions	814—818
Foreign Constitutions	814
India	815

CHAPTER IX

Right to Property .. 818—946**Article 31**

Compulsory Acquisition of Property	818—930
Foreign Constitutions	819
Clause (1)—No deprivation except under Law	828
Amendment	835
Report of Joint Committee	848
Effect of Amendment	851
Judicial Interpretations	854
Clause (2)	
Foreign Constitution	863
Principle of, before Amendment	869
Effect on, by Amendment	872
Requisitioning	875
Public Purpose	879
Compensation	886
Judicial Interpretation	891
Justiciability of Compensation	907
Clause (2-A)	913
Clause (3)	915
Judicial Interpretation	916
Clause (4)	917
Legislative entries	918
Judicial Interpretation	919
Clause (5)	922
Existing Law	923
Judicial Interpretation	924
Clause (6)	926
Judicial Interpretation	928

Article 31-A

Saving of Laws Providing for Acquisition of Estates etc. ..	930—942
Effect of Constitutional first Amendment ..	934
Judicial Interpretation ..	935

Article 32-B

Validation of Certain Acts and Regulations ..	942
The Ninth Schedule ..	943
Judicial Interpretation ..	944

CHAPTER X

Right to Constitutional Remedies ..	947—1048
--	----------

Article 32

Remedies for Enforcement of Rights conferred by this Part ..	947—1033
Foreign Constitutions ..	947
Clauses (1) and (2) ..	950
Directions, Orders or Writs ..	952
Taxing Law and Article 32 ..	953
Relative Powers under Articles 32 & 26 ..	904
Clause (3) ..	908
Clause (4) ..	959
Habeas Corpus ..	961
Mandamus ..	669
Prohibition ..	974
Certiorari ..	975
Quo warranto ..	980
General features of Articles 226 ..	982
Judicial Interpretation of Article 32 ..	990
Judicial Interpretation of Article 226 ..	995
Quasi-Judicial Acts ..	1008
Kochunni Moopil Nair case ..	1011
Constitution (Application to Jammu and Kashmir)	
Order of 1954 ..	1015
Appellate Remedies Articles 132—137 ..	1022
Articles 132 and 133 Scope of ..	1024
Article 136—Special Leave ..	1027
Questions of fact ..	1030

Article 33

Power of Parliament to modify the rights conferred by this Part ..	1033—1039
Foreign Constitution ..	1033
India ..	1036

Article 34	<i>Pages</i>
Restriction on rights conferred by this Part while Martial Law is in Force in any area	1039—1045
Foreign Constitution	1040
Martial Law Definition of	1041
India	1047

Article 35	
Legislation to give effect to Provisions of this Part	1045—1059
Foreign Constitutions	1046
Clause (a)	1046
Clause (b)	1046
Clause (c)	1047
Jammu and Kashmir Article 35 A	1048

PART II

CHAPTER XI

(Part IV of the Constitution)

Directive Principles of the Constitution	1050
General	1050
Foreign Constitutions	1059
Article 36	
Definition	1065
Jammu and Kashmir	1065—1067
Judicial Interpretation	1066

Article 37	
Application of the Principles Contained in this Part	1067—1071
Foreign Constitution	1067
Judicial Interpretation	1068

Article 38	
State to Secure a Social order for the Promotion of Welfare of the People	1071-1072
Foreign Constitution	1071
India	1071

Article 39	
Certain Principles of Policy to be followed by the State	1072—1077
Foreign Constitution	1072
India	1075
Citizen	1076

Article 40	
Organisation of Village Panchayat	1077—1078
Legislative Power	1078

	<i>Pages</i>
Article 41	
Right to work, to education and to public assistance in certain cases	1078—1080
Foreign Constitution	1078
India	1079
Article 42	
Provision for Just and Human Conditions of Work and Maternity Relief	1080
Foreign Constitutions	1080
India	1080
Article 43	
Living Wage, etc. to Workers	1080—1086
Foreign Constitution	1081
India	1083
Central Laws—List	1084
Article 44	
Uniform Civil Code for the Citizens	1086
Article 45	
Provision for Free and Compulsory Education for Children	1087-1088
Foreign Constitution	1087
India	1088
Article 46	
Promotion of Educational and Economic Interests of Scheduled Castes, Scheduled Tribes and other weaker sections	1089—1092
Foreign Constitution	1089
India	1089
Article 47	
Duty of the State to raise the level of Nutrition and the Standard of Living and to improve Public Health	1092—1095
Foreign Constitution	1092
Prohibition policy	1094
Article 48	
Organisation of Agriculture and Animal Husbandry	1095
Article 49	
Protection of Monuments and places and objects of National Importance	1097
Article 50	
Separation of Judiciary and Executive	1098
Article 51	
Promotion of International Peace and security	1099
Foreign Constitution	1099
India	1103

CHAPTER XII

Supplementary Chapter on Fundamental Rights 1105—1150

Article 13	1105
Doctrine of Waiver of Fundamental Rights	..	1106
Article 14		
Special Trial Procedure	1107
Connotation of 'Person'	1111
Discrimination	1111
Cow slaughter case	1113
Classification—Reasonability	1114
Waiver—Basheshar Nath case	1117
Article 16	1123
Article 19 (1) (a)	1123
Parliamentary Privilege: Search Light case	..	1124
Article 19 (1) (d)	1126
Article 19 (1) (f)	1126
Article 19 (1) (g)	1128
Taxation Laws	1129
Is Corporation a citizen	1130
Nationalisation of Motor Transport	1130
Article 20	1131
Article 21		
Is Contempt Law bad for want of Procedure established by Law	1132
Legislative Procedure	1133
Article 22	1134
Article 25	1135
Article 31 (2)		
Compensation	1136
Article 31-A	1137
Article 32	1137
Kavalappara case—Disputed questions of fact—if petition under Article 226 is dismissed, and no appeal filed can writ lie under Article 32	..	1141
Article 226	1145
<i>Certiorari</i> to quasi-Judicial tribunals	1146
Who can apply	1147
<i>Mandamus</i>	1149
Article 136	1150

CHAPTER XIII

Critical Review of Limitations of Fundamental Rights

	1151—1176
The Rule of Law	1151
The Six Safeguards of Liberty	1152
Rule of Law and Judiciary	1153
The Law of <i>ultra vires</i>	1154
Article 13	1155
Article 14	1157
The Law of non-Discrimination	1161
Titles	1162
Rights to freedoms	1162
Article 19	
Freedom of speech	1162
Freedom on Assembling	1163
Freedom of Association	1165
Freedom of Movement and Residence	1165
Passports	1166
Freedom of Property	1167
Reasonableness of Taxation	1168
Freedom of Profession etc.	1168
Protection of Life and Liberty	1171
Protection against Arrest and Detention	1172
Freedom of Religion	1173
Protection of Interests of Minorities	1174
Right to Property	1174
Article 12	
Constitutional Remedies	1175
Waiver	1176
Conclusion	1176
Index	1177—1192

TABLE OF CASES

A

Abanindra *v.* Mazumdar, 979
 Abdul Ali Abdul Rahman *v.* Thannulal, 216
 Abdul Azeez Dawood Marzook *v.* The Commr. I. T., 572
 Abdul Fatah Khan *v.* Govt. of Hyderabad, 221
 Abdul Fateh Khan *v.* Government of Hyderabad, 68
 Abdul Ghani Gori *v.* State, 659, 722
 Abdul Ghani Hussain Khan *v.* State of Madhya Bharat, 70
 Abdul Hakim *v.* Jan Mohammad 31, 44, 74, 75, 490, 512
 Abdul Hamid *v.* State of West Bengal 78, 875, 883, 891, 902
 Abdul Jabar Bud and Another *v.* State of J & K, 751
 Abdul Khadar *v.* State of Mysore, 38, 39, 75, 137, 143, 657
 Abdul Majid *v.* P. R. Nayak, 492, 824, 855, 875, 898, 976
 Abdul Majid Haji Mohammad *v.* P. R. Nayak, 506
 Abdul Mazid *v.* State of Madras, 980
 Abdul Munim Khan *v.* State of Hyderabad, 78, 203, 658
 Abdul Rahim *v.* J. A. Pinto, 76, 112
 Abdul Rahiman *v.* Emperor, 71
 Abdur Rahim and others *v.* Joseph A Pinto and others, 146
 Abdul Rahman Jamaluddin *v.* Vittal Arjun, 940
 Abdul Rashid *v.* Harish Chandra, (A. I. R. 1929 All. 940) 595
 Abraham Vazir Mavat and others *v.* State of Bombay and others, 60
 Abrams *v.* United States, 329, 315
 Abrecht *v.* U. S. A., 273 U. S. 1, 586
 Abdul Azeez *v.* State of Mysore, 979
 Abu Mohamad *v.* Chief Secretary, Saurashtra, (A. I. R. 1952 Sau. 98.), 584
 (Mrs.) A. Cracknell *v.* State of Uttar Pradesh 222, 986
 Adams *v.* new York, (1904) 192 U. S. 585, 607
 Adelaide Co. *v.* Commonwealth 776, 779
 Adelaide Company of Jehovah's Witness Incorporated *v.* Commonwealth, 85, 771
 Adkins *v.* Children's Hospital 295, 298, 645, 1062
 A. D. Narayana Sah and others *v.* Kannama Bai and others, 385
 Advocate General of Bombay *v.* Yusuf Ali, 778
 Aero Mayflower Tranist Co. *v.* Georgia Public Service Commission, 122
 A. G. *v.* Cole, 524
 Agarwal *v.* T. R. T. A., 971
 A. G. of Saskatchewan *v.* A. G. of Canada and Others, 27
 A. Hawker *v.* New York, 170 U. S., 189, 578

Ahmad-Un-Nissa Begum *v.* The State, 79
 Ahmed Moideen *v.* Inspector 'D' Division 1110
 Ahmed-Uu-Nissa *v.* State, 944
 Ajab Lal Mandal *v.* State of Bihar 480, 488, 925, 928
 Ajaib Singh, Lehna Singh *v.* State of Punjab, 448
 Ajit Kumar *v.* S. N. Maitra, 970
 Ajoib Singh *v.* State of Punjab, 59, 66, 569, 655, 1101, 1103
 Ajoy Kumar *v.* Calcutta Corporation, 979
 A. J. Perrias *v.* State of Madras, 1029
 A. K. Gopalan *v.* State of Madras 125, 145, 181, 431, 476, 639, 644, 653, 671, 673, 693, 710, 716, 732, 1173
 A. L. A. Schecter Poultry Corporation *v.* U. S., 1061
 Albert West Meads *v.* The King, 1039
 Ali Bux *v.* Emperor, 1934 All. 877, 595
 Alison *v.* Sen 979, 1000, 1027
 Allaudin Alla Bux *v.* M. R. Meher, 989
 All Geyer *v.* State of Louisiana, 538, 639, 1062,
 A. L. V. R. S. T. Veerappa Chetty *v.* State of Madras 928, 929
 Amar *v.* Government of Pepsu, 970, 973
 Amar Nath Bali *v.* State of Punjab, 65
 Amar Singh *v.* Custodian Evacuee Property, Punjab, 517
 Amar Singh *v.* State, 216
 Amar Singhji *v.* State of Rajasthan, 210, 905, 916, 937
 Amar Sing Ramyaram *v.* State, 215
 Amba Lal Purshottam Dass & Co. *v.* Gawar Lal Purshottam Dave and others 78, 202
 Ambaram *v.* Gurman Singh, 979
 Ambard *v.* Attorney General of Trinidad 376
 (Shree) Ambarnath Mills Corporation *v.* D. B. Godbole, 925
 Amerunnissa Begum *v.* Mahboob Begum 218, 1115, 1157
 Ameerunnissa Begum and others *v.* Mahboob Begum and others, 68
 Amerandra Nath Raj *v.* The State, 212
 American Federation of Labour *v.* Swing 112, 885, 897
 American Power Co. *v.* S. E. G. 1063
 American Steel Foundries *v.* Central Trades Council, 411
 American Sugar Refining Coy. *v.* Louisiana 147
 Amin *v.* The State, 615
 Amin Umma *v.* Income Tax Officer, 13
 Amirithal *v.* Govt. of Mysore, 37
 Amma Bazaar Patila Ltd. *v.* B. of H. S. L. I. E. 214
 Amnik Bhattacharya *v.* The State, 79
 Amrita Bazar Patrika Ltd. *v.* Board of High School & Intermediate Examination, 336
 Amrit Bhattachariya *v.* The State, 700

Amroati Electric Supply Co. v. M. H. Majumdar and another, 199
 Amulya Banerjee v. State of West Bengal, 719
 Ananda v. Ranisaihay, 981
 Ananda Sankar v. Government of West Bengal, 719
 Anand Kumar Bindal v. Employees' State Insurance-Corporation, 875, 910, 911, 926
 Ananta v. State, 678, 695, 696, 707, 711, 718
 Ananta v. State of Bihar, 718
 Ananta Krishnan v. State of Madras, 31, 73, 290, 292, 533, 535, 547, 549, 560
 Ananta Kumar Dutta v. Land Revenue Officer Nadia, 941
 Anant Bhaskar v. State 958
 Anant Reddy v. State of Hyderabad, 209
 Anil Kumar v. Dy. Commr. & Collector, 1136
 Anjali Roy v. State of West Bengal, 810
 Annie Basant v. Narayaniah 958, 963
 A. N. Ramgasamy v. Industrial Tribunal Ft. St. George, Madras, 83, 206
 A. N. Ranga Sami v. Industrial Tribunal, 77, 78
 Ansumali v. State of West Bengal, 655
 Antonio v. Inez, 527
 Anulathi v. Chatterji, 1170
 Anumali Sadhukham v. Asstt. Regional Controller Alipur, 570
 Anumathi Sadlukkan v. A. K. Chatterjee, 67, 546
 Anumati v. A. R. C. R., 983
 Anumati Sadhukan v. Asstt. Regional Controller, 564
 Anwar Ali v. State of W. B. 185, 976, 983
 Arizona Copper Co. v. Hammar, 637
 Arjan v. Emperor, 621
 Arunachalam chettiar v. Kaleswar Mills Ltd., Coimbatore, 482
 Arunachalam Swami v. State of Bombay, 216
 A. R. V. Achar v. Madras State, 69, 221
 Asaram v. State 687, 708, 710, 721
 Ashby v. White, 964
 Ashcroft v. Tennessee, 610, 635
 Ashgar Ally v. Birendra. 981
 Ashraf Ali Khan v. State of W. B. 1005
 Ashutosh Lahiri v. State of Delhi, 677, 715
 Ashwini Kumar Ghose v. Aravinda Bose, 542, 1139
 Ashwini Kumar Ghose and Another v. Arbinda Bose and Another, 1141
 Asiatic Engineering v. Achhru Ram, 489, 512, 955, 977
 Asiatic Engineering Coy. v. Archu Motilal, 74
 A. S. Prasad Rao v. Provincial Government, C. P. and Berar, 733
 A. S. Rubem v. Narayan Moreshwar, 79
 Assam Company v. State of Assam 79, 505, 901
 Associated Tubewells Ltd. v. Gujarmal Modi, 1032
 Asst. Collector v. Soorajmull, 975, 977, 980
 Aswin Kumar v. Aravinda Bose, 992, 1175
 Aswini Kumar Nath v. State of West Bengal, 72, 204, 895
 Atar Ali v. Joint Secretary, 441

A. Thangal Kunju v. M. Ventatachalam Pillai, 1000
 Atkins v. Children's Hospital, 1061
 Atkins v. Kansas, 520, 637
 Atma Ram v. State of Bihar 72, 549, 757
 Atma Ram and Others v. The State of Punjab, 941
 Atolchow Singh v. Chief Commissioner, Manipur, 888
 Attar Singh v. State of U. P. 1116
 Attelliswamy v. Hyderabad State, 211
 Attorney General v. De Keyser's Royal Hotel 462, 825, 868, 888
 Attorney General v. Wiltz United Dairies, 825, 868
 Attorney-General For Queensland v. Attorney General For The Common-Wealth, 59
 Attorney-General of Alberta v. Attorney-General of Canada, 33
 Atulya Kumar v. Director of Procurement and Supply, 78, 202, 486, 564, 902
 Aurora Ram Dullamall v. State of Uttar Pradesh 494, 926
 Australia v. Bank of New South Wales, 309
 Australian Marketing Board v. Tonking, 827, 868, 886
 Automobile Products v. Rukmaji, 978
 Avdesh Pratap Singh v. State of U. P. 976, 986, 988
 A. Valentine v. Chrestensen, 323
 A. Vedachala Mudaliar v. Divisional Engineer Highways Saidapet, 545
 Azizuddin Ansar v. State of Hyderabad, 82
 Azizun Nisa v. Asstt. Custodian and others, 64, 979

B

Baban v. Emperor, 685
 Baboo Ram v. State, 678
 Babu Lal v. Gowardhan Das, 513
 Babulal Amthalal Mehta v. Collector of Customs, Calcutta, 217
 Babul Chandra Mitra v. The Chief Justice and other Judges of Patna High Court, 82, 534
 Babu Ram and others v. State, 1109
 Babu Rao Narayana Rao Sanas v. Union of India, 994
 Babu Rao Shantaram Mose v. Bombay Housing Board and Another, 81
 Badami Bai v. Tobin, 976, 978, 979
 Badri Batan Lal Rawat v. Vindhya Pradesh Govt. and Another, 156
 Badri Batan Lal Rewat v. Vindhya Pradesh Govt., 204
 Badri Prasad Missir v. The State, 202
 Badruddin v. Aisha Begam, 789
 Bagawat Singh v. State of Rajasthan, 68
 Baghat Transport v. State of H. P., 971
 Baghavant v. Dy. Commissioner, 829
 Baghawali Kishore v. Vindhya Pradesh Transport Appellate Tribunal, 67
 Bahadur Singh v. Jaswant Raj, 70
 Bahadur Singh and Another v. Jaswant Raj Mehta and Another, 220
 Baijayananda v. State of Bihar, 486, 784, 795, 857
 Bai Jaya Nanda Giri v. State of Bihar, 206

- Baij Nath Prasad Tripathi *v.* State of Bhopal, A I R 1957 S C J 494 : 1957 S C C 255 : 1957 S C J 405 : 603
 Bailey *v.* Alabama, 753
 Bailey *v.* Anderson, 824, 907
 Bai Marium *v.* Asst. Custodian, 977
 Bain Peanut Co. *v.* Pinson, 187
 Baijnath *v.* Ram Nath, 30
 Baisnab Patnaik *v.* State, 697
 Baji Rao *v.* Emperor, 652
 Baj Sahi Ban Sher Singh *v.* State of Rajasthan, 82
 Baker *v.* Grice, 1037
 Bakery and Pastry Drivers etc. *v.* Wohl, 320
 Bakhtawar Singh Bishal Singh *v.* State of Pepsu, 715
 Baktawar *v.* The State, 707, 711, 739, 741
 Balabhan Manaji *v.* Bapuji Satwaji Nandanwar, 940
 Balabhan Manaji *v.* Nandanwar, 227
 Balagurunathan *v.* C. R. T. Board, 979
 Bala Krishna Berman *v.* Asst. Secy. Govt. of W. Bengal, 396
 Balakrishnan *v.* State of Madras, 72
 Bala Krishan *v.* State of Punjab, 973
 Balbir Singh *v.* The State, 1095
 Balbir Singh Marwaha *v.* State of M. P., 264
 Baldeo Mitter *v.* Emperor, A I R 1947 Pat 281, 610, 964
 Baldeo Singh *v.* State of Bihar, 1032
 Balkrishna *v.* Simpson, 98
 Balraj Kunwar *v.* Jagat Pal Singh, 831
 Balrama Chetty *v.* The State of Madras, 481
 Banarsi Das *v.* Cane Commr. U. P. Lucknow, 211
 Banchanidhi Somantray *v.* Secretary, Bhakta Madhu Vidyapitha, 987
 Banjilal *v.* Income Tax Officer, 488
 Banker Life and Casualty Company *v.* John W. Holland, 950
 Bankey *v.* Jhingan, 65
 Bankey Singh *v.* Jhingan Singh, 66, 438
 Bank of Hindustan *v.* K. Surya Narayana Rao, 494
 Bank of India *v.* John Bowman, 213
 Banmalai Das *v.* Pakhu Bhamdari, 213
 Banmali Das *v.* Pakhu Bhandari, 543
 Banmali Das *v.* Pakhu Bhanwari, 525
 Banmali Das *v.* Pakhur Bhandari, 75, 290
 Bansi Das *v.* State of U. P., 268
 Banwari Lal *v.* The State, 619
 Banwari Lal Raigarhia *v.* Cloth Controller Bihar, Patna and Another, 69
 Banwarilal Rajgarhia *v.* Cloth Controller, Bihar, 546
 Bapu Rao Dhondida Jagtop *v.* State, 390, 408
 Barbier *v.* Connolly, 88, 112, 116, 122, 301
 Bernardo *v.* Ford Gassage's, 961
 Barrows *v.* L. Jackson, 212
 Basanta *v.* Emperor, 696
 Basanta *v.* K. E. 696
 Basanta *v.* K. Erup, 651
 Basanta Chandra *v.* Emperor, 739
 Basappa *v.* Nagappa, 997, 999
 Basappa *v.* Nagappa and Others, 1031
 Basheshar Nath *v.* I. T. Commissioner, 1106, 1117
 Bashir *v.* State, 698, 730
 Bashisht *v.* Radhika, 196
 Basti Sugar Mills Ltd. *v.* State of U. P., 861
 Bata Shoe Co. *v.* Ali Hasan, 978
 Bathinda Ramakrishna Reddy *v.* State of Madras, 380
 Batuk *v.* Surat Municipality, 978
 B. B. Light Ry. *v.* Dt. Board, 982
 B. B. L. Railway *v.* District Board, 968, 991
 B. C. Gupta *v.* Bijoyranjan Rakshit, 972, 990
 Beatty *v.* Gibbanke, 771
 Beatty *v.* Gilbanks, 407
 Beavers *v.* Haubert, 662
 Bedford *v.* United States, 866
 Behram and Others *v.* Phusa and Others, 495
 Behram Khurshid Pesikaka *v.* State of Bombay, 1118
 Bejoyranjan *v.* C. C. Das Gupta, 972
 (M/s.) Bengal Chemical and Pharmaceutical Works Ltd. *v.* The Employees, 1149
 Bengal Immunity & Co. *v.* State of Bihar, 862, 974
 Benoy *v.* Govt. of Assam, 706, 711
 Benoy Bhusan Chakravarthi *v.* Govinda Chandra Sarma, 255
 Berar Provincial Patwaris' Association *v.* State of Bombay, 915
 Beshleswar Nath *v.* Commissioner of Income Tax, 1176
 Betts *v.* Brady, 316 U. S. 455, 605
 Beugor & P. R. & Co. *v.* McComb, 461
 Bhahani Prasad Saha *v.* Shri Sarat Sundan Choudhuri, 911
 Bhaghwan Das Ganga Sahai *v.* Union of India, 994
 Bhag Singh *v.* Kartara, 925
 Bhag Singh *v.* Kartara and others, 210
 Bhagubai Dullabhbbhai Bhandari *v.* Dist. Magistrate, Thana, 453
 Bhagirath Ram Chand *v.* State of Punjab, 936
 (Dr.) Bhagwant Kishore Tondon *v.* Deputy Commissioner, Rewa., 895
 Bhagwant Kishore Tondon *v.* U. P. Transport Appellate Tribunal, Rewa and Another, 220
 Bhagwant Kishore Tandon *v.* Vindhya Pradesh Transport Appellate Tribunal, 70
 Bhagwati Saran *v.* State of U. P., 1129
 Bhailal *v.* Additional Deputy Commissioner Akola, 955, 952
 Bhairabendra *v.* State of Assam, 934, 1024
 Bhaishankar *v.* L. M. Wadia, 384
 Bhajaram Swami *v.* State of Orissa, 493, 497
 Bhaluka Behera *v.* State, 614
 Bhanganpal Tewari *v.* State of U. P.
 Bhanjee Nunjee *v.* State of Bombay, 896
 Bhanleka Behera *v.* State, 615
 (Dr.) Bhanu Shankar Joshi *v.* State and Another, 65
 Bhanwari Lal *v.* Mst. Mangi Bai, 62
 Bhapubai Ratanchand Singh *v.* State of Bombay, 536
 Bharat Bank Ltd. *v.* Employees B. B., A I R 1950 S C 188 : 459, 596, 601, 975, 1027, 1028
 (Messrs.) Bharat Board Mills Ltd. *v.* The Regional Provident Fund Commissioner, 64, 528
 Bharat Chandra Maiti *v.* Gour Chadra A dak, 68, 202

- Bharwad *v.* State of Saurashtra, 971
 Bhaskar *v.* Mohd. Ali Moda Khan, 80
 Bhaskar *v.* Mohd. Alimulla Khan, 899
 Bhaskar *v.* Mohd. Atimullah Khan, 291
 Bhatnagar & Co. *v.* Union of A I R, 1002
 Bhatnagar & Co. *v.* Union of India, 997
 Bhaurao Atmarampatil *v.* Sub-divisional Officer Chandur Morsi, 571
 Bhauro Atma *v.* S. D. O., 140, 493
 Bhawani Singh *v.* The State, 215
 Bhidhu Bhushan Bagchi *v.* State of West Bengal, 417, 986
 Bhiku Lal *v.* State of M. P., 986
 Bhim Chandra *v.* Deputy Director of Education Bihar, 517
 Bhimji Nasasu Mane *v.* Vijyasini Rao Rama Rao Dale, 212
 Bhim Sen *v.* State of Orissa, 912
 Bhimsen *v.* The State of Punjab, 677, 678, 703, 718
 Bhoja Ram Swain *v.* State of Orissa, 81
 Bhrij Bhushan *v.* State, 614
 Bhudan Chaudhry *v.* State of Bihar, 1115, 1156
 Bhudan Choudhry and Others *v.* The State, 82
 Bhugi Ram *v.* Supdt. of Police, 139
 Bhupendra *v.* Government of West Bengal, 696
 Bhutya *v.* Radha Kishan Lal, 862
 Biba Bhati *v.* Ramendra, 1026
 Bibhuti Bhushan Gosh *v.* Damodar Valley, 990
 Bidhu Bhushan Bagchi *v.* State of West Bengal, 986
 Bidi Supply Co. *v.* Union of India, 25, 140, 1158
 Biffer *v.* City of Chicago, 400
 Bihar Subai Sunni Majlis Awkaf *v.* Sita Ram and Another, 79
 Bijai Bahadur *v.* State, 673
 Bijay Cotton Mills *v.* Ajmer, 1169
 Bijoya Nanda *v.* Balkrushan, 81
 Bijoyranjan *v.* C. C. Das Gupta, 974
 Bijyananda Gir *v.* State of Bihar, 83
 (Smt.) Binla Devi *v.* Chaturvedi, 76, 569
 Bindeshwari Mandal *v.* Birju Mandal, 1112
 Bindra Ben and Others *v.* Sham Sunder and Others, 1148
 (Messrs.) Binjaraj *v.* Union of India, 37
 Bir Bhadra Pratap Singh *v.* D. M. Azamgarh, 1135
 Birdhichand Bansilal *v.* Municipal Committee of Ajmer, 856
 Birendra Kumar *v.* Ashtush Adikhari, A I R 1957 Tripura 47. See A I R 1957 All 557, 596, 603.
 Birendra Singh *v.* Excise Commissioner, 539
 Birmingham Vinegar Brewery *v.* Henry, 376
 Bishambar Nath *v.* State of Punjab, 79
 Bishnucharan *v.* State of Orissa, 74, 195, 544
 Bishwanibhar Singh *v.* State of Orissa, 81, 197, 910, 940, 1104
 Bisvambara Singh *v.* Orissa State, 1068, 1104
 Biswambar Singh *v.* State, 938
 B. Johnsons & Co. Ltd. *v.* Minister of Health, 1010
 B. K. Linganna *v.* State of Mysore, 408
 (Dr.) B. K. Nanjun Deswara Krishnayya *v.* State of Coorg, 213
 Blackpool Corporation *v.* Locker, 92
 Bland *v.* People, 371
 Block *v.* Hirsh, 299, 483, 522
 Bloom Field *v.* State, 123
 Bloxam *v.* Favre, 1100, 1102
 (Dr.) B. N. Khare *v.* Election Commr., 217
 (Dr.) B. N. Khare *v.* Pandit Jawahar Lal, 953
 Board Air Line Co. *v.* U. S., 867
 Board High School & Intermediate Education *v.* Ram Krishna, 1007
 Bodi Alam *v.* State of Bihar, 72, 290
 Boer *v.* United States, 295
 Bombay *v.* Vaidya, 1173
 Bombay Education Society *v.* State of Bombay, 812, 816, 1174
 Bompalli Sathia *v.* Government of Hyderabad, 707
 Bosappa *v.* Nagappa, 977
 Bowman *v.* Secular Society, 1159
 Boyd *v.* United States, (1886) 116 U. S. 616 : 605, 607
 Bradiwell *v.* The State, 523
 Bradley *v.* Richmond, 111
 Bradwell *v.* Illinois, 118
 Bradwell *v.* State of Illinois, 542
 Brahma Parkash *v.* State of U. P., 378
 Brahmeshwar Prasad *v.* State of Bihar, 33, 58, 65, 656, 732
 Brahmeshwar Prasad *v.* The State, 740
 Brajnandan *v.* State of Bihar, 985
 Brajnandan Sharma *v.* State of Bihar, 290, 291
 Brajnandan Sharma *v.* State of Bihar, 67
 B. Ram Lal *v.* State, 62, 84, 493
 Brass *v.* Dakota, 522
 Brass *v.* Stoesser, 520
 Bridge *v.* California, 18
 Bridge *v.* Wixon, 411
 Bridges *v.* California, 327
 Bridhichand Bansi Lal *v.* Municipal Council Ajmere, 858
 Brig. Commr. Meerut *v.* Ganga Pd., 1168
 Brij Bhukan *v.* S. D. O. Siwan, 140
 Brij Bhukan *v.* S. D. O., Siwan, A I R 1955 Pat. 1, 602
 Brij Bhukan *v.* S. D. O. Siwan, 861
 Brij Bhukan Kalwar *v.* S. D. O. Siwan & others, 888
 Brij Bhushan *v.* State of Delhi, 367
 Brij Bhushan *v.* State, 740
 Brij Bhushan *v.* State of Delhi, 64
 Brij Kishore *v.* Rent Control Officer, 973
 Brij Nath Sarin *v.* Uttar Pradesh, 77
 Brij Raj *v.* Shaw and Bros, 978
 Brindaban Chandra *v.* State of Orissa, 80, 513
 British India Corporation *v.* Govt. of U. P., 82
 British India Corporation Ltd. Kanpur *v.* Govt. of Uttar Pradesh and others, 486
 British India Corporation Ltd. *v.* Industrial Tribunal, 1000
 British Medical Stores *v.* L. Bhagirath Mal, 140
 Brojo Lakshmi *v.* Sailendra Nath, A I R 1959 Cal 260, 604

Brown v. Bd. of Education of Topeka, 240
 Brown v. Mississippi, 635
 Brown v. United States, 1037
 Brown v. Walker, (1886) 161 U. S 591, 598:
 605
 Brundaban Chandra v. State of Orissa, 492,
 899
 Bryant v. Zimmerman, 412
 B. S. Kesava Iyenger v. State of Mysore,
 25, 268
 Buchanan v. Warley, 231
 Buck v. Bell, 26, 520, 637,
 Buck Man v. Button, 1943, 2 K B 405, 579
 Budge Budge Municipality v. Mangu, 984
 Budhan Chowdhry v. State of Bihar, 211,
 1024, 1107
 Budhan Chowdhry and others v. The State,
 207
 Budhmal v. Gulabsing, 988
 Budhu v. Allahabad Municipality, 72,
 292, 542, 568, 982, 1065, 1066, 1070, 1093
 Bugajewitz v. Adams, 228 U S 585, 576
 Burdeaw v. Mc Dawell, 108
 Burdett v. Abbott, 958
 Burma v. State, 644, 655
 Burma Shell Oil Storage and Distribution
 Co. of India Ltd. v. Licensing Officer of
 Tamluk Municipality, 216
 Burns Bakery Co. v. Bryan, 298
 Burzbonr v. City of Riverside, 322
 Butchers-Hide Co. v. Seacombe, (1941) 2
 K B 401, 579
 Butler v. Perry, 756
 Buttlar v. Baldwin, 754

C

(Messrs.) Calcutta Chemical Co. Ltd. v. The
 Asst. Collector of Customs and others 1149
 Calcutta Motor & Cycle Co. v. Director of
 Customs and others., 625
 Calder v. Bull, (1798) 3 Dallas, 386, 574, 580,
 581
 California v. Edwards, 428
 Callman v. Mills, 29
 C. Ambalam v. S. Jagannatha, 1007
 Cantonment Board Poona v. Western India
 Theatres Ltd., 205
 Cantweell v. Connecticut, 767, 770
 Carlsband Mineral Water Co. v. Jagtiani,
 969
 Carlsbond Co. v. Jagtiani, 970
 Carlson v. California, 320
 Carlene Products v. U. S. 522
 Carpenters and Joiners Union v. Ritter's
 Cafe, 361
 Carrol v. Greenwich Insurance Co. N. Y.,
 413
 Cathu Madia Nair v. Commissioner H.R. and
 Charitable Endowments, 482
 Cedars Rapids Manufacturing and Power Co.
 v. Lacoste, 868
 Central Bridge v. Lowell, 822
 Central Control Board v. Canon Brewery,
 826
 C. F. Vandy v. Adams, 693
 Chadrasekhara v. I. T. Commissioner, 75
 Challapakri Rao v. Dakshinamoorthy, 1001
 Chamar Baugwala v. Union of India, 550

Chamba Valley Transport Ltd. v. State of
 Himachal Pradesh, 305
 Chambers v. Florida, 26
 Chambers v. Florida, 309 U. S. 227, 610
 Champakam v. State of Madras 47, 150, 181,
 809, 1050
 Chander Deo Sharma v. State, 71
 Chandler v. Dunbar, 866
 Chandra v. State of Raj, 758
 Chandra Shekar v. State of Bihar, 715
 Chaplinsky v. New Hampshire, 327
 Chappali v. United States, 867
 Charanjit Lal v. Union of India, 152
 Charleston Fed Savings v. Alderson, 131
 Charokee Nation v. S. Kansas R. Co., 867
 Chastleton Corporation v. Sinclair 299, 483,
 1110
 Ghattey Lal v. State, 1111
 Chaturbhai Sahai v. Bihar State Co-operative
 Bank, 541
 Chaudry v. M. C. Bannerjee, 976
 Chaundhri Ram Bhaj v. Punjab State, 715
 Chellappa Pillai v. State of Travancore
 Cochin, 425
 Chembers v. Florida, 26
 Chemung Canal Bank v. Lowry, 228
 Chenchanna Naidu v. Prajaseva Transport,
 Ltd. 984, 988
 Chennamma v. Dyana Scetty, 80, 246
 Cherokee Nation v. Kansa Ry. Co., 824
 Chester v. Bateson, 651
 (Sm.) Chhayen Devi v. State of Bihar, 875,
 914
 Chhota Bai & others v. State of M. P., 998
 Chhotabhai v. State of M. P. 971
 Chhotabhai Jethabhai Petel and Co. v. Union
 of India, 73
 Chicago v. Rhine, 325
 Chicago, B. & Q. R. Co. v. McGuire, 103
 Chicago, B. & R. Co. v. Mc Guire 291, 776
 Chicago C. R. T. R. Co. v. Wellman, 521
 Chicago Etc. R. Co. v. Chicago, 636, 867
 Chicago & ST. P. R. Coy. v. Minnesota,
 120
 Chiman Lal Dipchand v. State of Bombay,
 945
 Chintamani Pratihari v. State of Orissa, 796,
 1025
 Chintaman Rao v. State of Madhya Pradesh,
 291, 302, 304, 388, 545, 1163, 1169
 Chintaman Rao v. The State, 64
 Chiranjit Lal v. The Union of India, 88, 231,
 289, 301, 476, 485, 501, 513, 828, 829, 830,
 831, 855, 856, 869, 877, 951, 966, 974, 1013,
 1111, 1113, 1115, 1130, 1139, 1156, 1159
 Chotabhai v. Union of India, 488
 Choteyal v. State of Uttar Pradesh 32, 71
 Chotey Lal v. The State of Uttar Pradesh
 and others, 46
 Christie v. Leachinsky, 629
 Chungchi Cheung v. King, 1102
 Chuni Lal v. Corporation of Calcutta, (1933)
 37 C W N 737 : 574, 579
 Cincinnati v. Louisville and N. R. Co., 876
 City of Cincinnati v. Vester, 866
 City of Melbourne v. Commonwealth, 85
 C. K. Achutan v. State of Kerala 913, 1123

Clark v. Nash, 299, 866
 Cleveland, Etc. R. Co. v. Nunford, 36
 Clifford v. O'Sullivan, 975
 Clyatt v. United States, 753
 Clyde Brown v. Robert Aalein., 224
 Clyde Engineering Co. Ltd. v. Carburn, 59
 C. M. Chacko v. G. Korah Punnen and Others, 562
 C. Nataraja Mudaliar v. Madras State, 78, 902
 C. N. Subramanya Ayyar v. N. Dharmalinga Padayachi, 1106, 1110
 Cochran v. Louisiana State, 798
 Coleman v. Griffin, 770
 Coleman v. Tennessee, 1036, 1037
 Coleman v. Tennessee, 97 U. S., 509, 587
 Collector of Customs v. Calcutta Motor Cycle Co. 616
 Collector of Malabar v. Erimmal Ebrahim Hajee, 653, 689
 Collins v. Texas, 105
 Com. H. R. E. v. Lakshminidra Thirtha Swamiar, 69, 801
 Commercial Co. v. Collector, 973
 Commings v. Missouri, 542
 Commissioner v. Logan, 826
 Commissioner, Hindu Religious Endowments v. Lakshminidra 1168
 Commissioner, H. R. E. Madras v. Sri Lakshmi Thirtha Swamiar of Sri Shirur Mutt, 472, 782
 Commissioner of Police v. Gordhandad, 972, 973
 Commonwealth v. Huon Transport, 869, 870
 Commonwealth v. Roby, 12 Pick (Mass) 496.
 See Stakia Crim. P 1 2nd Edn. 587
 Commonwealth v. Surridge, 409
 Commonwealth of Pennylavina Ex. Rel Wads Work v. Shortall, 1038
 Commr. of H. R. E. Board v. Sri Lakshminidra Thirtha Swamiar of Shirur Mutt, 793
 Concordia Fire Ins. Co. v. Illionis, 123
 Connolly v. General Construction Co., 635
 Consolidated Edison Co. v. N. L. R. B., 1032
 Contra McLawrin v. Okhalhama S. Regents, 247
 Cooke v. United States 1102, 637
 Cooper v. Wilson, (1937) 2 K. B., 309, 596
 Co-op Society v. Bella, 66
 Cooverjee v. Excise Commission, 1170
 Cooverjee B. Barucha v. Excise Commissioner, 993
 Cooverjee B. Bharucha v. Excise Commissioner Ajmere, 81
 Coppage v. Kansas, 328
 Corn Products v. Eddy, 520
 Corn Products Refining Co. v. Eddy, 564
 Corporation of Calcutta v. St. Thomas School, 471
 (The) Corporation of Madras v. Spencer & Co., 139, 558
 Corporation of the city of Nagpur v. the Nagpur Electric Light and Power Company Ltd., 1149
 Cosmopolitan Club v. Com. Tax Office, 984
 Courtney M. Mabce v. White Plains Publishing Co., 557
 Cosmopolitan Club v. D. C. Tax Officer, 983, 984

Counselman v. Hitchcock, (1892) 142 U. S. 547, 605
 Cox v. New Hampshire, 311, 401, 406, 768
 C. P. Mathen v. District Magistrate, Trivandrum, 963
 C. P. Philip v. Trav. Co. State, 72
 C. P. Sarathy v. State of Madras, A I R 1951 Mad., 191, 584
 Cracknel v. State of U. P., 66
 Craig v. Henry, 323
 C. Rajendra v. Govt. of West Bengal, 884
 Crampati v. Ajmer, 1170
 Crast Realty Co. v. Schneider, 147
 Crawford v. Spooner, 650
 C. R. H. Ready Money Ltd. v. State of Bombay, 511
 Crivagi v. Moore, 322
 C. S. S. Motor Service v. Madras State, 77, 220, 532, 535, 543, 562
 C. V. Transport v. State of H. P., 970

D

Dabhi Harsingh Laxmananji v. State, 697, 719
 Dakshewari Cotton Mills v. Commr. I. T., 979, 1032
 Dal Chand v. The State 200
 Damodar v. Narayanan, 980
 Damodar Ganesh v. State, 74
 Damodar Ganesh and others v. State, 359
 Dankins v. Panlet, 1034, 1035
 Darchy v. Kansas, 27
 Darcy v. Allain, 524
 Dartmouth College v. Wood Ward, 636
 Das Gupta v. Bijoyranjan, 987
 Dattatraya Moti Ram v. State of Bombay, 79, 203, 242, 263, 734
 Dattu Pant v. Advya Ghari, A I R 1956 Hyd 127, I L R (1956) Hyd 355, 603
 Davidson v. Board of Administrators of New Orleans, 637
 Davidson v. Doherty & Co., 122
 Davis v. Beason, 766, 770
 Dawarkha Das Bhatia v. State of J. & K., 751
 Dayanand Modi v. State of Bihar, 728
 D. C. Grazier v. Stephens, 122
 D.C. Mills, Ltd. v. Commr. of L. T. W. B., 1029
 D. G. Works v. State of Saurashtra, 1026
 D. Darraju v. General Manager, 952
 Deep Chand v. State of U. P., 1105, 1136, 1150
 De Jonge v. Orgeon, 327
 Delhi Cloth and General Mills Co. v. Income Tax Commissioner, 961
 Deinbi Bai Gangi v. Ronji Sofai, 376
 Dennis v. United States, 329
 Dent v. West Virginia, 299
 Deodat Rai v. State, 67, 218, 686, 687, 694
 Desai Nagardas Lalubhai v. Fagsi Bhikha and others, 68
 Devaraj v. State of Madras, 70, 792
 Devi Dayal v. Pepsu State, 984
 Devi Dayal v. State of Patiala, 901
 Devisaran v. State, 83, 347
 Dhakeswari Cotton Mills v. Commissioner of Income Tax, 1029
 Dhan Bahadur Ghorti v. State of Assam, 957

Dhan Bhador *v.* State, 446
 Dhanraj Mills *v.* E. K. Kocher, 956
 Dharan Chand *v.* Ladu Ram, 689, 680
 Dharam Chand Kishore Chand Puri and Bros. *v.* Excise and Taxation Commissioner, Jullundur, 986
 Dharam Dco *v.* State, 660
 Dhcmal *v.* State of Rajasthan, 226
 Dhirajlal Vithalji *v.* Dy. Custodian of Evacuee Property, Mangalore, 224, 924
 Dharendra Kumar *v.* Supdt. and L. Remembrancer and West Bengal State, 69
 Dharendra Kumar *v.* Supdt. and Remembrancer of Legal affairs to the Govt. of West Bengal, 219
 Dharendra Kumar Mandal *v.* Superintendent and Remembrancer of Legal Affairs, 1157, 1115
 Dhirwaha Devi Singh Gohil *v.* State of Bombay, 945
 Dholpur Co-operative Transport and Multipurpose Union *v.* Appellate Authority, Rajasthan, 561
 Dhoom Singh *v.* The State, 614
 Digambar Amk *v.* Nande Amk, 528
 Digambar Aruk *v.* Nanda Aruk, 689, 692
 Dinabandu *v.* Jadumani, 1032
 Din Dayal *v.* State, 226
 Dindigal Skin Merchants' Association *v.* Industrial Tribunal Mathurai, 78
 Dinesh Chandra Doreh *v.* A. M. Dam, 1149
 Dinshaw *v.* State of Hyderabad, 906
 Director of Endowment of Govt. of Hyderabad *v.* Akram, 40
 Director of P. P. *v.* Lamb, (1941) 2 K B 89, 579
 Dist. Board, Muzaffarnagar *v.* The Upper India Sugar Mill, 454
 District Magistrate, Travandrum *v.* K. G. Mammen Mapillai, 962
 D. K. Nabhi Rajiah *v.* State of Mysore, 894, 39
 D. Macropollo & Co. (Private) Ltd. *v.* D. M. & Co., Ltd. Employees' Union, 1031
 Ddrai Rajan *v.* State of Madras, 67, 128
 Dorasamy Nadar *v.* Emperor, 623
 Dowidson *v.* Board of Administrators of New Orleans, 8
 Downes *v.* Bidwell, 770
 D. Parraju *v.* General Manager, 955
 Dr. Bhagwant Kishore Tondon *v.* Deputy Commissioner Rewa, 895
 Dr. Bhanu Shankar Joshi *v.* State and Another, 65
 Dr. B. K. Nanjundeswara Krshnayya *v.* State of Coorg, 213
 Dr. B. N. Khare *v.* Election Commissioner, 217
 Dr. B. N. Khare *v.* Pandit Jawaharlal, 953
 Dr. Dwarka Bai *v.* Prof. Nainan, 202
 Dr. Dwarka Das *v.* Prof. Nainon Mathews, 77
 Dr. Jayaram *v.* Govt. of Purjab State, 336
 Dr. Karc *v.* State of Delhi, 302
 Dr. K. C. Nambiar *v.* State of Madras, 201
 Dr. Khare *v.* State of Delhi, S C R, 303, 388, 543, 563, 1163, 1166
 Dr. N. B. Khare *v.* State of Delhi, 75, 292, 451, 720

Dr. Ram Krishna Bharadwaj *v.* State of Delhi, 655, 719
 Drucc *v.* Beaumont Trust, 650
 (Messrs) D. S. & G. Mills *v.* The Union of India, 1113, 1129
 D'Silva *v.* Emp., 650
 Dubar Goala *v.* Union of India, 755, 757
 Dugdale *v.* R., 372
 Dulla *v.* State, 1096
 Duncan *v.* Jones, 402
 Durgadas *v.* Rex, 680
 (Shri) Durga Ji *v.* State of Bihar, 855
 Durga Prasad *v.* State of Maddhya Pradesh, 905, 906
 Durga Prasad *v.* The State, 140
 Durga Prasad Khaitan *v.* The Commercial Tax Officer, 570
 Durga Singh *v.* State, 722
 Dwarkadass Shrinivas *v.* Sholapur Spinning and Weaving Co. Ltd., 68, 471, 473, 541, 858, 863, 877, 897, 902, 924.
 Dwarikadasi *v.* State of Bihar, 787
 Dwari Kadasji *v.* State of Bihar, 780
 (Dr.) Dwarka Bai *v.* Prof. Nainan, 202
 (Dr.) Dwarka Das *v.* Prof. Nainon Mathews, 77
 Dwarkadas *v.* Sholapur Spinning Co., 829, 854, 875, 913
 Dwarka Prasad *v.* State of Uttar Pradesh, 69, 546, 1115, 1157, 1169, 1170
 (Messrs) Dwarka Prasad Lakshmi Narain *v.* State of Uttar Pradesh, 307
 Dwarka Tewari *v.* State of Bihar, 1106
 Dy. Commr. Hardoi *v.* Rama Krishna, 1026
 Dynes *v.* Hooler, 1036, 1037, 1039

E

Earnest John White *v.* Mrs. Kathleen Oliver White, 1031
 Eastern Rail Road Co. *v.* Boston and Marine Rail Road, 824, 867, 878
 East India Industries Ltd. *v.* Industrial Tribunal, Madras, 545
 Ebrahim *v.* Custodian of Ev. Property, 977, 978
 Ebrahim Aboobaker *v.* Custodian General, 998
 Ebrahim Vazir Mavat *v.* State of Bombay, 69, 198, 1013, 1140
 (Dr.) Edward A. Barsky *v.* Board of Regents of the University of N. Y., 638
 Edward Ezra and others *v.* The State, 68, 221
 Edwards *v.* Thrash, 309
 Elanak Ramakka *v.* State, 211, 494
 Elbridge *v.* R. K. Das, 983
 Elderton *v.* Totalistor Co., 650
 Election Commission *v.* Saka Venkata, 985, 1024
 Elias *v.* Pasmore, 462, 608, 609
 Emperor *v.* Abdul Rahiman, 64
 Emperor *v.* Amiruddin Sale Bhoy Tybjee, 386
 Emperor *v.* Gajanan, 669
 Emperor *v.* Giraud, 685
 Emperor *v.* Iboo, 686
 Emperor *v.* Iqbal Krishna Kapoor, 668
 Emperor *v.* John McIvor, A I R 1936 Mad, 353, 595
 Emperor *v.* Joti Prasad Gupta, 53 All, 641—A I R 1932 All 18, 592

Emperor *v.* Keshar, 652.
 Emperor *v.* Keshav Gokhale, 667
 Emperor *v.* Mahasha Khushal Chan and Another, 376
 Emperor *v.* Narayanan Dhaku Bhill, A I R 1928 Bom 240, 595.
 Emperor *v.* Purushotham Trikamdas, 668
 Emperor *v.* Rajadhar, 652.
 Emperor *v.* Shib Nath Banerjee, 442, 667.
 Emperor *v.* Sumer Singh, 709, 710
 Emperor *v.* Vimla Bai Desh Pande, 442, 640
 Emperu Manar Jeer *v.* H. R. E. Board, 976
 Empress *v.* Ganesh Prasad, (1889) 2 P L R 66, 594
 Entick *v.* Carrington, 608, 630
 Erinmal Ebrahim Hajee *v.* Collector of Malabar, 688, 692
 Errington *v.* Minister of State, 1010
 Eshug Bayi Eleko *v.* Govt. of Nigeria, 18, 629, 631, 650, 651
 Eshug Bayi Eleko *v.* Officer Administering Government of Nigeria, 665, 964
 Euclib *v.* Ambler Reabty, 491
 Everett Orient Line Incorporated *v.* Jasjitt Singh, 1128
 Everson *v.* Board of Education of Ewing, 767, 769, 791, 797
 Express Newspapers Ltd. *v.* Union of India, 1003, 1004, 1008, 1130

F

Fair Child *v.* St. Paul, 866
 Fakir Prasad Ghose *v.* Kripasindhu Pal Bhute, 384
 Fall Brook Irrigation District *v.* Bradley, 637, 824
 Fare Field *v.* Huntington, 22 A L R 1438, 577
 Farquharsen *v.* Morgan, 974
 Fathmi Bi *v.* The State of Madras, 77, 499, 583, 601, 901
 F. E. Darukhanawalla *v.* Khem Ghand, Lal Chand, 82
 Federal Communication Commissioner *v.* Pottsville Broadcasting Co., 568
 Federal Communications Commissions *v.* W. F. R. The Good Will Station, 731
 Feldman *v.* United States, 635
 Feshing Bhai Ishwar Lal *v.* Emperor, 29, 42, 67
 Firm Jaswant Raj, Jai Narain *v.* Sales Tax Officer, 153
 Firm of Sona Rajab *v.* S. Tax Officer, Secunderabad, 83
 Firm Sona Rajaiah *v.* S. T. Officer, 206
 Firm Udai Raj *v.* Commercial Supplies, 66
 Firm Udai Raj, Bankey Lal *v.* Commissioner Civil Supplies, Rajasthan and Others, 53
 F. K. Gupta *v.* The State, 66
 F. N. Roy *v.* Collector of Customs, 217
 follel *v.* Mc Gromick, 332, 557
 Foot *v.* Buchanan, (1902) 113 F E D 156, 161, 605
 Fox *v.* Ohio, 5 How., 410, 586.
 Fox *v.* Washington, 371
 Framjee *v.* Secretary of State, 756
 Fram Nusservanji Balsara *v.* State of Bombay, 66, 181, 373, 1069

Francis *v.* State of Madhya Pradesh, 786, 795
 Frank *v.* Man Gum, 120, 636
 Franklin *v.* Minister of Town and Country Planning, 498, 1010
 Fraser *v.* City of Fraser Ville, 889
 Frick *v.* Webb, 123
 Frisbie *v.* U. S., 520
 Frohwek *v.* United States, 365, 363
 Frome United Breweries *v.* Bath Justices, 95

G

Gadai *v.* Emperor, A I R 1943 Pat 361, 574, 579
 Gains *v.* Washington, 662
 Gajapati Narayan Deo *v.* State of Orissa, 908, 919, 936
 G. Alavandar *v.* State, 391
 Gama *v.* Banwarilal, 981
 Gampers *v.* Buck's Store Co., 337
 Ganapathy Bhatta *v.* Emperor, 36 Mad 308, 394
 Ganapati *v.* State of Bihar, 1024
 Ganapat Rao Yadora0 *v.* State of M. P., 224
 Ganesh Das Ramgopal *v.* Govt. of U. P., 988
 Ganesh Prasad *v.* State of Uttar Pradesh, A I R 1954 All 116, 600
 Gangadhar *v.* State of Rajasthan, 977
 Gangadhar Rao Narayan Rao Mazumdar *v.* State of Bombay, 933, 937, 931
 Ganpathi Singh Ji *v.* State of Ajmer, 494, 546
 Gast Realty Co. *v.* Schneider, 111
 Gavadinam *v.* A. D. Khan, 971
 G. C. Bezbarua *v.* State of Assam & others, 544
 G. Chadayamury *v.* State, 39, 66
 G. Chandrasekara Reddy *v.* Commissioner of Income-Tax, 569
 G. D. Bhattar *v.* The State, A I R 1957 Cal 483, 603
 Geeta Ram *v.* The State, 679
 General *v.* People, 4 Ill 363, 587
 General Motor Bus Service Tank *v.* R. T. A. Jaipur, 145
 George Chandayamurry *v.* State, 422
 German Alliance Insurance Co. *v.* Lewis, 522, 537
 Gesulal *v.* State of Hyderabad, 854
 (Messrs) Ghaico Mall & Sons *v.* The State of Delhi, 1095
 Ghamandi *v.* Parshdi, 513, 855
 Ghamandi and another *v.* Parshadi and another, 79
 Ghamandi and another *v.* Parshadi and others, 199
 Ghanai Ram Pachhuram *v.* The State, 143, 208
 Ghatti Seetha Rama Uppanna and another *v.* The Dy. Commissioner for H. R. and Charitable Endowments Masulipatnam, 482
 Ghirja Mohan *v.* Adl. Dist. Magistrate, 83
 Ghislal *v.* Regional Transport Authority, 986
 Ghitramoham *v.* Additional District Magistrate, 497.
 Ghulam Ahmed Ashai *v.* State, 750

Ghulam Quadir Hawabaz *v.* State, 659
 Ghulam Rasul *v.* State of J. & K., 63, 1014
 Gibbs *v.* Burke, 635
 Girdhar Gopal *v.* State, 77, 129, 201, 246
 Girdhari *v.* Jawala, 496
 Girjananda *v.* State of Assam, 800, 889
 Girindra Nath *v.* Birendra Nath, 962
 Giroward *v.* U. S., 769
 Gitlow *v.* New York, 124, 310, 325
 Globe Theatres Ltd. *v.* State of Madras, 82, 140, 207
 G. M. T. Society *v.* State of Bombay, 979
 G. Mulu Bhoja *v.* G. Shivubha Govind, 224
 G. Nageswara Rao *v.* Andhra Pradesh State Road Transport Corporation, 912, 1003, 1008, 1010, 1131, 1137
 Gobardhan Joshi *v.* State of Bihar, 572, 979
 Gobinda *v.* Dinesh, 890
 Gobinda Chandra Daku *v.* Dinesh Chandra Maitra, 895
 Gochhiker *v.* State of Orissa, 1127.
 (Mrs.) Godavari Parulekar *v.* O Sham Rao Parulekar *v.* State of Bombay, 76, 731, 992
 Godu Ram *v.* Suraj Mal, 380
 Goesaert *v.* Bleary, 1076
 Golam Bari Molla *v.* State of West Bengal, 83
 Gompers *v.* Buck's Store, 324
 Gopalakrishna *v.* Krishna, 938
 Gopalan *v.* State of Madras, 13, 33, 65, 310, 476, 526, 649, 702, 829, 967, 1120, 1144
 Gopalan *v.* The State, 112, 733
 Gopal Chandra Mukherjee *v.* B. C. Dass Gupta and others, 542
 Gopal Das *v.* State, 83, 204
 Gopal Das *v.* State of Assam, 391, 566
 Gopal Das Mohta *v.* Union of India, 1119
 Gopal Krishna *v.* State of M. P., A I R 1952 Nag. 170, 591, 599, 983
 Gopal Rao *v.* Varanasi, 545
 Gopal Umed Singh Narubha *v.* State, 658
 Gopeshwar Prasad *v.* State of Bihar, 75
 Gopichand *v.* Delhi Administration, 1116
 Gordon Woodroffe & Co. *v.* S. Venugopal, 1005
 Gorge Chadrya Mommury *v.* State, 38
 Gour Gopal *v.* Chief Secretary, 679
 Gouripada Bandopadhyay *v.* S. Banerjee, Secy. to Govt. of W. Bengal, 486
 Government of Bombay *v.* Abdul Wahab, A I R 1946 Bom 38, 594
 Goviers *v.* United States, (1911) 220 U S 338, 588
 Govinda *v.* Dinesh, 922
 Govinda *v.* State of Uttar Pradesh, 74, 896, 918
 Govindan Nair *v.* Emperor, 962
 Govinda Reddy *v.* Pattabi Rama Reddy, 986
 Govind Prasad Srivastava *v.* State of Bhopal, 958, 987
 Gowripada Bandopadhyay *v.* S. Banerjee Secretary to Government, 78
 Grace Bros. *v.* Commonwealth, 827, 868
 Grafton *v.* United States, 206 U S 333, 586
 Graham *v.* West Virginia, 224 U S 616, 586
 Grant *v.* Sir Charles Gould, 1034
 Grappton *v.* United States, 1037
 Graves *v.* Minnesota, 542

Green *v.* Fraizer, 867
 Greene *v.* Home Secretary, 633
 Green *v.* Secretary of State for Home Affairs, 664
 Grenada Lumber Co. *v.* Mississippi, 413
 Grijananda Chaudury *v.* State of Assam, 907
 Grillert *v.* Minnesota, 1037
 Grivens *v.* Zerbst, 1043
 Grosjean *v.* American Press Co., 300, 337
 Grover Irrigation and Land Co. *v.* Louella Ditch Reservoir and Irrigation Co., 122
 G. Thirupathya *v.* G. Appala Naidu, 1000
 Gulabchand *v.* Kudilal, 1026
 Gulabdas and Co. *v.* Asst. Commr. of Customs, 1001
 Gulam Hussain *v.* Fakir Mohammad, 380
 Gulam Nabi *v.* State, 611
 Gulam Rasul *v.* State of Jammu and Kashmir, 226
 Gulf Colorado and Santa Fe. Railway Company *v.* Ellis, 104, 116, 173
 Gunapathy Keshav Ram *v.* Nafissul Hussain, 692
 Gundial Singh *v.* Singh, 1099
 Gurbachan *v.* State of Bombay, 303
 Gurbachan Singh *v.* State of Bombay, 72, 146, 292
 Gurbachan Singh *v.* State of Bombay and Another, 71
 Gurbakasha Singh *v.* State, 714
 Gurcharan *v.* State, A I R 1957, 557 : 603
 Gurdial Kaur *v.* The State, A I R, 33
 Gurdial Singh *v.* State, 689, 692
 Gurubachan *v.* State of Bombay, 196, 1163
 Guru Dayal *v.* Monalal, 546
 Gurumukh Singh *v.* Union of India, 23, 31, 33, 231
 Gurusamy *v.* State of Mysore, 973, 994
 Gurusamy *v.* State of Mysore and Others, 998
 Guruviah Narinder and Bros. *v.* State of Madras, 527, 549,
 Gwalior Sugar Co. Ltd. *v.* State of Madhya Bharat, 223, 210
 G. W. Sadlery *v.* King, 363

H

Haheeb Mohammed *v.* State of Hyderabad, 39, 68, 76, 1107
 Hadecheck *v.* Sebastin, 483
 Hadibandhu Padhan *v.* Emperor, 958
 Hagar *v.* Reclamation Dist., 461, 634
 Hague *v.* Committee of Industrial Organization, 322, 399, 421
 Haisnam Baruniton *v.* Thokcham Ningol, 1113
 Haji Nadir Ali Khan *v.* The Union of India, 863
 Haji Suleman Yusuf Bhar *v.* Custodian of Evacuee Property, Madhya Bharat, Gwalior, 860
 Hale *v.* Henkel, (1906) 201 U S 43 (66), 604, 605, 610
 Hall *v.* Nixon, 29
 Halstead *v.* Clark, (1944) K B 250, 589
 Hamabai *v.* Secretary of State, 757
 Hamidia Match Manufacturing Co. Ltd., Bhopal *v.* State of Bhopal, 544

- Hamilton *v.* Regents of the University of California 769
 Hammer *v.* Dagenhart, 759, 1061, 1062, 1063
 Hammer *v.* State, 122
 Hanover Fire Ins. Co. *v.* Carr, 122
 Hanover Ins. Co. *v.* Harding, 1130, 1111
 Hans *v.* Louisiana, 950
 Hans Muller *v.* Supdt. Presidency Jail, Calcutta, 212, 994
 Hans Raj *v.* State, 680, 689
 Hanwant Chand *v.* Principal, Mahraj Kumar College, 216
 Haquiqutulla Khan *v.* The State, 707
 Haran Chandra Dutt *v.* State of West Bengal 204, 981
 Harbans Singh *v.* Conservator of Forests and another, 1014
 Har Dutt Roy Motilal Jute Mills *v.* State of Bihar, A I R 1957 Pat 1, 583
 Harendra *v.* Hari Dasi, 1026
 Haren Kalita *v.* The State, 79
 Hari *v.* Dy. Commissioner of Police, 1166, 994
 Harikhemu Gawali *v.* Deputy Commissioner of Police Bombay, 453
 Hari Das Mundhra *v.* State, 1112
 Hari Krishan Das *v.* Emperor, 668
 Hari Prasad *v.* State of Assam, 656
 Hari Shankar Bagla *v.* State of M. B., 81
 Hari Shankar Bagla *v.* State of Madhya Pradesh, 544
 (Shri) Harish Chand *v.* Collector of Amritsar, 1111
 Hari Vishnu *v.* Ahmad, 978, 979, 1024
 Hari Vishnu *v.* Syed Ahmed, 977, 999
 Harla *v.* The State of Rajasthan, 93
 Harman Singh *v.* Regional Transport Authority Calcutta, 208
 Harnam Singh and Others *v.* Regional Transport Authority 81
 Harnam Singh and Others *v.* R. T. A. Calcutta Region, 138
 Har Murat *v.* The State, 76, 200, 564
 Har Nath Rathi *v.* State of Hyderabad, 1005
 Harpal Singh *v.* The State, 67, 656
 Harris *v.* Louis Ville, 459
 Har Tirath *v.* The Crown, 652
 Hasan Ali *v.* State of Bombay, 67
 Hasan Alii Mahammad Hussain *v.* State of Bombay, 65
 Hawker *v.* New York, 523, 576
 Hayes *v.* Missouri, 46
 Hazari Lal *v.* State of H. P., 565
 (Messrs) Hazari Lal Bhanna Mal *v.* State of H. P., 202, 310, 564, 990
 H. B. Singh *v.* T. N. H. Ongbi Bhani Devi, 1135
 H. C. Nambiar *v.* State of Madras, 77
 Heber *v.* Queen of Portugal, 112
 Hedden *v.* Evans 1035, 1041
 Helvering *v.* Mitchell, 303 U S 391, 588
 Heman *v.* State of Bombay, 75, 875, 898
 Hemant Kumari *v.* Gauri Shanker, 252
 Herndon *v.* Lowry, 388
 Hernal Singh *v.* State, 694
 Herrin *v.* Arnold, 104
 H. H. Sri Viswathoma Tirtha Swamiar of Soda Mutt, Udipi *v.* State of Madras, 795
 Hickman *v.* Maisey, 252
 Higgins *v.* Wills, 1040
 Hildesheimer *v.* Faulkener, 650
 Hill *v.* Alabama, 320
 Hilton *v.* Guyot, 1102
 Himamshu Bimal Mitra *v.* The State, 967, 991, 1145, 1176
 Himmat Lal Harilal Mehta *v.* The State of M. P., 70, 973, 1013
 Hindustan Electric Co. Ltd. *v.* Regional Provident Fund Commissioner, Punjab, 1111
 Hindusthan Vanaspathi Co. Ltd., Bombay *v.* Municipal Board, Ghaziabad, 940, 935
 Hirabhai *v.* State of Bombay, 549
 Hiralal Satwala *v.* The State, 80, 489
 Hiranmoy *v.* State of Assam, 210, 247, 262
 Hira Singh Bam *v.* State of Himachal Pradesh, 856, 899
 Hodges *v.* United States, 753
 Hoke *v.* Henderson, 23 American Decisions, 578, 687
 Holden *v.* Hardy, 520, 637
 Holden *v.* Minnesota, 137 U S 483, 580
 Holt *v.* United States, (1910) 211 U S 245, 252, 605, 610
 Home Telegraph *v.* City of Los Angeles, 149
 Homi Rustomji *v.* Sub Inspector, 964
 Hopi *v.* Utah, 110, U S 89, 576
 Horner *v.* United States, 325
 Hoshiar Singh *v.* Kowla, 72, 511
 Hoshiar Singh and another *v.* Mt. Kowla and others, 53
 H. P. Bahuna *v.* State of Assam, 214
 H. P. Khandewal *v.* State of U. P., 928
 Hudson Bay Co. *v.* MacLay, 664
 Hukum Chand Mills *v.* The State of M. P. and others, 1117
 Humberies *v.* Cowner, 401
 Hurd *v.* Hodge, 250
 Hurlpurshad *v.* Sheo Dyal, 979
 Hurtado *v.* California, 636, 637
 Hurtado *v.* People of California, 6, 9, 637
 Hussain Bee *v.* State, 511
 Hussain-ud-din Bandey and others *v.* The State, 750
 Hutchinson Ice Cream Co. *v.* Iowa, 520, 564
- I**
- Ibrahim *v.* R. T. A., 976
 Ibrahim Pillai *v.* Principal University, Intermediate College, Trivandrum, 1005
 Ibrahim Vazir Mavat *v.* State of Bombay, A I R 1954 S C 229, 602
 Inderdeo Singh *v.* The State, 76, 404, 405, 407, 740
 Inder Deo Singh and others *v.* The State, 43
 Inderjit Singh *v.* State of Delhi, 68, 687, 694
 Inder Prakash *v.* Emperor, 708
 (Messrs) India Coffee and Tea Distributing Co. Ltd. *v.* The State of Madras, 209
 (Messrs) Indian Iron & Steel Co., Ltd. *v.* Their Workmen, 1031
 Indian Metal and Metallurgical Corporation *v.* Industrial Tribunal, Madras, 290, 571
 Indian M. M. Corporation *v.* Industrial Tribunal, 532, 525
 Indian Quarter Masters' Union *v.* P. R. Dutt, 988

Indra Narayan *v.* State of W. Bengal, 74
 Indu Kumar *v.* The State, 65
 Ingle Wood Pulp Co. *v.* New Brunswick
 Commission, 826
 International Brotherhood of Teamsters *v.*
 Hawke, 362
 Iqbal Ahmed *v.* State of Bhopal, 82, 658
 Irappa Nagappa *v.* The State, 729
 Isai Ammal *v.* Rama, 978
 Ishoda Nand Biswas *v.* The State, A I R 1955
 Pat 396, 602
 Ishwari Prasad *v.* N. R. Sen, 293, 292, 303
 Islam *v.* State of Bihar, 978
 Ismail *v.* State of Orissa, 65, 75, 656
 Ispahani *v.* Union of India, 980
 Israil Khan *v.* State, 441, 449
 Iswar Gopal *v.* Pratap Mal, 1026
 Iswari Prasad *v.* N. R. Sen, 73, 291, 486, 493
 I. T. Commissioner *v.* Badri Dass, 98

J

Jack *v.* Kansas, 199 U S 372, 605
 Jacobson *v.* Massachusetts, 520, 637
 Jagannath *v.* D. M., 972
 Jagannath Baksh *v.* United Provinces, 871,
 876
 Jagannath Natimal *v.* State of Bhopal, 71
 (Sri) Jagannath Ramanuja Das *v.* State of
 Orissa, 81, 782, 794, 801, 1168
 Jagat Singh *v.* State of Hyderabad, 205, 535
 Jagdish *v.* P. T. Co., 72, 544
 Jagdish Patel *v.* Patel Tobacco Co. & G. C.
 Sankar, 559
 Jagjiwan Das *v.* State of Bombay, 983
 Jagjiwan Ram *v.* The State, 655
 Jagjiwan Rao *v.* The State, 66, 649
 Jagjiwan Rao Daya Bhai *v.* The State, 203
 Jagu *v.* Shankal, 1168
 Jagveera *v.* State of Madras, 908
 Jahangir *v.* Sait Inder Mull, 976
 Jai Chand *v.* State of Punjab, 248
 Jai Lal *v.* Padam Singh, 69, 247
 Jain Transport and General Trading Co.,
 Mathura *v.* State, 529
 Jain Transport and Trading Co. Mathura *v.*
 State of U. P. 32, 875
 Jalaraka *v.* State, 709
 Jamal *v.* Emp., 651
 Jamison *v.* Texas, 388, 767
 Jamna Das *v.* I. T. Commissioner, 74
 Jam Nagar Motor Transport Union Ltd. *v.*
 State of Saurashtra, 494
 Jamuna Prasad Mukhariya *v.* Lachhi Ram,
 1029, 1032
 Janardhana Reddy *v.* State of Hyderabad,
 687, 954, 956, 967, 991
 Janardhan Mallan *v.* The Cochin Devaswam
 Board, 792, 796
 Janardhan Reddy *v.* The State, 1029
 Janardhan Shridhar *v.* Management Hukum
 Chand Mills Ltd., Indore, 425
 Jang Bahadur *v.* Principal Mahendra College,
 348, 300
 Jang Bahadur Sant Lal *v.* The Principal,
 Mohendra College, Patiala, 392
 Jangi Lal *v.* Baij Nath Singh, 66
 Jangir Singh *v.* State, 714
 Janikaraman *v.* State of Andhra Pradesh,
 1123
 Janikaramayya Raju *v.* Emperor, A I R 1934
 Mad 311—57 Mad 554, 594
 Jann Prasanne *v.* W. Bengal, A I R 1949
 Cal 1, 574
 Jansen Farms *v.* City of Indianapolis, 122
 Jatish Chandra *v.* B. K. Sinha, 292, 450
 Jayanati Mohan Lal Shah *v.* State of Saurash-
 tra, 63
 Jayanti Lal *v.* State of Saurashtra, 292, 305,
 491, 495
 Jayanti Lal Lakshmi Shankar *v.* State of
 Saurashtra, 443
 Jayanti Lal Laxmi Shanker *v.* State of Sau-
 rashtra, 65
 (Dr.) Jaya Ram *v.* Govt. of Punjab State, 336
 Jaya Singh *v.* State, 698, 715
 Jeevan Lal Gupta *v.* The Chief Justice and
 Puisne Judges of Lahore High Court, 377
 Jeewan Ram *v.* United States of Rajasthan,
 72, 875, 884
 Jeithya *v.* The State, 612
 Jeshing Bhai Ishwar Lal *v.* Emperor, 29, 42,
 67
 Jesing Bhai *v.* Emperor, 291, 302, 304, 388,
 431, 448, 952
 Jet Bahdur Singh *v.* The State, 672
 J. Habhubha *v.* State of Bombay, 912
 Jhalajorubha *v.* State, 673
 Jhansi Goundan *v.* Kanni Ammal, 31, 32
 Jhonston Fear and Kingham and Another *v.*
 Commonwealth, 85
 Jit Bahadur Singh *v.* The State, 77
 Jivaji Rao Cotton Mills *v.* The Chairman
 Industrial Court, 77, 200
 Jivraj Joharmal *v.* The State A. I. R., 453
 Jiwan Lal *v.* State, 433, 700
 J. K. Gupta, *v.* The State, 66, 221
 J. Loomchand Sait *v.* The Official Liquidat-
 ors, Peerdan Joharmal Bank Ltd., 78
 J. Nageswara Rao *v.* The State of Madras,
 70, 82
 (Messrs.) J. N. Prusty & Bros. *v.* State of
 Orissa, 1007
 Joga Singh *v.* State of Punjab, 711
 Johannesson *v.* United States, 225 U. S. 227,
 575, 580
 John Cook *v.* Commonwealth, 869
 John Kodroft *v.* Saint Nicholas, 770
 Johnson *v.* Maryland, 122
 Johnson *v.* Minister of Health, 1064
 Johnstone *v.* Commonwealth, 868
 Johnston Fear & Kingham and another *v.*
 Commonwealth, 826
 Joint Family Firm of Jamna Lal Ram Lal
 Kimtee *v.* Krishen Dass and State of Hydera-
 bad, 213
 Jones *v.* Opelika, 557, 767
 Jones *v.* Skinner, 471
 Joseph Hurtado *v.* People of California, 279
 Joseph Thomas *v.* State of Kerala, 814
 Joshi *v.* State of Madhya Bharat, 1161
 Joshi D. P. *v.* M. B. State, 212
 Judd *v.* McKeen, 770
 Jugul Prasad *v.* Bhadai Das, 79, 292, 199
 Jung Bahadur *v.* Principal, 1024
 Jupiter General Ins. *v.* Rajagopalan, 74, 484,
 543, 829, 877, 985, 1076, 1129
 Jupiter General Insurance Co., Ltd. *v.* Raja-
 gopalan and Another, 423, 894

Jupiter Ins. Co. v. Rajagopalan, 871
 Juwan Sinji v. Tribunal, 423, 978
 Jwala Prasad v. State of J. & K. 1014
 Jyotirmoy v. Govt. of West Bengal, 967
 (Kr.) Jyoti Sarup v. Board of Revenue, 76, 200

K

Kadar Nath Bajoria v. State of West Bengal, 139
 Kailash Nath v. Emperor, 685
 Kailash Nath v. State of U. P., 528, 997, 1001
 Kailash Nath and others v. State of U. P., 997
 Kaka Ramji Laxman v. State of Kutch, 69
 Kaki Rani Rawat v. State of Saurashtra, 1107
 Kalash v. A. A. C., 984
 Kalawanti v. State of Himachal Pradesh, (1953) S C J 144, 590, 592
 Sm. Kalawati and another v. State of Himachal Pradesh, A I R 1953 S C 131, 597, 601, 611
 Kalhi Raving v. State of Saurashtra, 644
 Kalika Kumar Singh Lagdhirji v. Saurashtra State, 203, 895
 Kamala v. Calcutta University, 973
 Kamalakant v. Emperor, 652
 Kamala Kant Azad v. Emperor, 668
 Kameshwar v. State of Bihar, 71, 830, 870, 943, 1124
 Kameshwar Singh v. Province of Bihar, 67, 829, 871, 875
 Kameshwar Singh and Others v. The State of Bihar and another, 65, 217
 Kamkrishna v. Radham Lal and Other, 71
 Kanai Lal v. Province of Bihar, 709
 Kandaswamy v. Textile Commissioner, 66, 489, 493, 544, 546, 564
 Kandiyil Varnia Pudukudi Ramunni Kurup and others v. Panchayat Board Badagara, 68
 Kandoi Velji v. Bhuj Municipality, 210
 Kanglu Banla v. Chief Executive Officer, 999
 Kannangra v. The King, (1950) 55 C W N 37 (40) P C, 589
 Kansas City Co. v. Read Improvement, 111
 Kanti Cotton Mills v. State of Saurashtra, 80, 200
 Karam Chand Tapar and Bros. v. Vijayanand, 72
 (Messrs) Karam Ghand Thapar & Bros. v. Dr. Vijay Anand and others, 151
 Karam Singh v. Nihal Khan, 910
 (Dr.) Kare v. State of Delhi, 302
 Kariyappa v. Samanna, A I R 1955 Mys 138, 603
 Karkare v. Shevde, 987, 989
 (The) Karnal Kaithal Co-operative Transport Society Ltd. v. The State of Punjab, 1006
 Kashi Prasad Singh v. State of M. P., 1127
 Kather Dutt v. Dist. Magistrate, 862
 Kathi Raning Rowath v. State of Saurashtra, 65, 71, 139, 231, 232, 242, 265, 1013, 1115, 1157
 Kavalappara Kottarathil Kochunni Alias Moopil Nair v. The State of Madras, 1138

Kawal Mal Singhi v. Neta Ram and others, 203
 K. C. G. Narayan Deo v. State of Orissa, 76, 902, 920, 945
 (Dr.) K. G. Nambiar v. State of Madras, 201
 K. C. Vara Dachari Madras Oil Mills v. State of Madras, 139
 K. E. v. Sadashiv, 348
 Kedar Nath v. West Bengal, 1159
 Kedar Nath Bajoria v. Ramji Das Bajoria and another, 76
 Kedar Nath Bajoria v. State of W. Bengal, 581, 1115, 1156
 Kepner v. United States, (1904) 195 U S 100, 587, 588
 Kerik v. Aiken Board of Health, 460
 K. Erup v. Sibnath, 651
 Kesari Singh v. The State, 723
 Keshava Reddy v. Nafisul Hussain, 1125
 Keshav Menon v. State of Bombay, 64
 Keshav Menon v. State of Bombay, A I R 1951 S C 128-1951 S C R 228, 584
 Keshav Talapade v. Emperor, 713
 Kewal Ram Ahuja v. State of Bombay, 39
 Khacheru Singh v. State of U. P. 1031
 Khader v. Mannuswami, 1032
 Khader v. Subramania, 544, 543
 Khagendra v. District Magistrate, 67, 441, 450
 Khalal Dana v. Kutch Govt. Civ. Rev. App., 71
 (Dr.) Khare v. Delhi, 1166
 (Dr.) Khare v. State of Delhi, S C R, 303, 388, 543, 563, 1163
 Khoja Masumali Kanji of Talaya v. Custodian of Evacuee Property Rajkot, 898
 Kidangazi Manakkal Narayanan Nambudripad v. State of Madras, 81, 207, 805
 Kinduri Buchi Raja Lingam v. State of Hyderabad, 205
 King v. Board of Education, 1001
 King v. Cabbet, 314
 King v. Grehill, 963
 King v. Kidmon and Others (1915) 20 C L R 425 H G, 577
 King v. London Country Council, 498
 King v. Nelson, 641
 King v. Philips, 386
 King v. Sussex, 976
 King Emperor v. Vimla Bai, 961
 Kinkar v. Nikhil, 613
 Kishanchand Arora v. The Commissioner, 1129
 Kishan Singh v. State of Rajasthan, 214, 486, 493, 906
 Kishori Lal v. The State, 453, 487, 656, 699
 Kishori Lal Kanoo v. Dy. Commr. Kamrup and others, 501
 Kista Reddy v. Commissioner of City Police, 988
 Kitchie v. Illinois, 637
 K. K. Kochunni Mopil Nair v. State of Madras, 1011, 1143
 K. Mohammad Khassim v. Municipal Council, Ootacamund, 560, 568
 Knighty v. Bell, 1034, 1035
 K. N. Joglekar v. Barsi Light Railway Company, 555

Knox *v.* Lee, 823
 K. N. Pandavathi *v.* Distt. Collector Trivandrum, 83, 916
 Kodarap Lakmiah *v.* State of Hyderabad, 917
 Kohl *v.* United States, 461 824, 866,
 Kohn *v.* Anderson, 1036
 K. O. John *v.* State, 63
 Kondunri Buchi Raja Lingam *v.* State of Hyderabad, 82
 Kottayya *v.* Venkatayya, (1917) 40 Mad 977, 591
 Kovoces *v.* Cooper, 292, 328
 K. P. Doctor *v.* State of Bombay, 862
 K. Publishing house *v.* Govt. of T. C., 984
 Krishna *v.* Director of Lands, 922
 Krishna *v.* L. H. & D. E. Command, 74
 Krishna Ayyr *v.* The Urban Bank Ltd. Calicut, 975
 Krishna Chandra Chatterjee *v.* Chief Supdt. Telegraph office Calcutta, 391
 Krishna Dutt *v.* Satyanjan Bhuttacharjee, 57 C W N 368, 583
 Krishna Iyer *v.* State, 226
 Krishna Kesavan *v.* State of Kerala, 614, 1171
 Krishna Khandelwal and another *v.* Director of Land Hiring and Disposal Eastern Command, 151
 Krishna Khandewal *v.* Director of L. H. & D. E. Command, 204
 Krishna Kutti *v.* State of Travancore-Cochin, 75, 289, 336, 543, 957
 Krishnamorthy *v.* Venkateswaralu, 74
 Krishnamurthy *v.* Vekateswaran, 196, 493
 Krishnan *v.* State of Madras, 654, 695, 697, 734
 Krishnan Kutty *v.* State, 987
 Krishna Pillai *v.* Parukutty Ammal, 74, 157, 203
 Krishna Sharma *v.* State, 389
 Krishna Sharma *v.* State, W. B., 84
 Krishna Warrior *v.* State, 68, 422
 K. R. Jyoti Sarup *v.* Board of Revenue, 76, 200
 Kruise *v.* Johnson, 29
 Krygger *v.* Williams, 756
 K. Sankaran Nair *v.* N. Goundan Nambiar, 475
 K. Sethu Madhava Rao *v.* Collector of South Arcot, 421
 K. Shitendra *v.* Chief Secy. of Bengal, 283, 285
 Kulandan Velan Chettiar *v.* Ayinan Chettiar, 659
 Kuldip Singh *v.* Punjab State, 513, 860
 Kulomoni *v.* The State, 652, 708, 711
 Kumaran Nambudiri *v.* Cochin De Waswam, 211, 475
 Kundan *v.* Secretary of State, 497
 Kunhambu *v.* Local Fund Overseer Chirakkal, 558
 Kuppasamy *v.* The King, 1025
 Kure Singh *v.* State of Punjab, 906
 Kushaldoss *v.* Advani, 1011
 Kutumbayya *v.* Lakshmi Narasimha Rao, A I R 1943 Mad 6, 595
 K. V. Subbiah Choudhry *v.* G. Parandamiah, 1112

K. V. Subramanya Iyer *v.* Emperor, A I T R 1931 Mad 181, 60 M L J 299, 592
 Kwong Hai Chew *v.* Captain, 638

L

Labaram *v.* The State, 708
 Lachhman Singh Bhagwan Singh, *v.* I. G. of Police, 215
 Lachman Das *v.* State of Bombay, 129
 Lachman Das Kewal Ram *v.* State of Bombay, 65, 218, 1107
 Lachner *v.* New York, 26
 Lackland *v.* R. R. Co., 822
 Lakama Raju Seetha Rama Raju *v.* Lakuma Raju Siva Rama Raju, 208
 Lakam Phal P. L. *v.* State of Jammu and Kashmir, 1048
 Lakan Singh *v.* Bal Bir Singh, 381, 382
 Lakkan Singh *v.* Bal Bir Singh and Another, 77
 Lakhi Narayan Das *v.* Province of Bihar, 649, 669, 741
 Lakshman Das *v.* State of Bombay, 1159
 Lakshmi *v.* Commissioner, 977
 Lakshmi Devi *v.* State, 659
 Lakshmi Lal *v.* Bhagwat, 983
 Lakshmindra Teertha Swamiar *v.* H. R. E. Madras, 66, 771 781, 792, 875
 Lal Bachan Singh *v.* Suraj Bali, 687
 Lal Bahadur *v.* State of Bihar, 695
 Lal Chand *v.* Collector of Sirmur, 970
 Lal Mani Devi *v.* State, 653
 Lal Raj Kishore *v.* Dist. Board of Saharanpur, 70
 Lal Singh *v.* C. P. and Berar, 871
 Lal Singh *v.* State of Rajasthan, 80
 Lalu Gope *v.* The King, 293, 710
 Lam Bert *v.* Yellowby, 299
 Lanzetta *v.* New Jersey, 100, 329
 Lapnira *v.* Williams, 99
 Laprina *v.* William, 119
 Largent *v.* Texas, 421, 767
 Lawrence D' Souza *v.* State of Bombay, 729
 Laxman *v.* D. E. Officer, 80
 Laxman *v.* D. F. Officer, 559
 Laxmanappa *v.* Union of India and Sikhar Chand *v.* Bank of Baghel Khand, 854
 Laxmanappa Hanumantappa *v.* Union of India, 953, 1119
 Laxmanappa Nanumantappa Jam Khandi *v.* Union of India, 830
 Laxman Ichdram *v.* Forest Officer, 544
 Laxman Prasad *v.* U. P. Government, 964
 Laxman Prasad Sharma *v.* U. P. Govt. 668
 Laxman Singh *v.* Raj Pramukh of Madhya Bharat, 956
 (Sri) Laxmi Janardan Jew *v.* State of W. B., 1126
 Lazette *v.* New Jersey, 634
 Leach *v.* Money, 630
 Leather *v.* Lordsont, 524
 Legal Rememberancer, Behar *v.* Biphuti Bhushan Das Gupta, 82
 Levy Leasing Co. *v.* Siegal, 483
 L' Hote *v.* New Means, 429
 L' Hote *v.* New Orleans, 309
 Liberty Cinema *v.* The Commissioner, Corporation of Calcutta and Another, 1129
 Liggett Co. *v.* Baldrige, 124, 484,

Light Ry. Co. *v.* State of Bihar, 983
 Lilavati *v.* State of Bombay, 978, 980, 1002
 Lincoln National Ins. Co. *v.* Read, 1111
 Lindsey *v.* Natural Carbonic Gas Co., 104,
 112, 116, 483
 Lindsey *v.* Wash, 301 U. S. 397, 578
 Linganna *v.* State of Mysore, 389
 Lingappa *v.* State of Mysore, 213
 Liversidge *v.* Anderson, 295, 632, 650, 651,
 663, 664, 669, 726, 743
 Local Government Board *v.* Arlidge, 90, 96,
 731, 1009, 1010,
 Lochner *v.* New York, 296, 302, 636, 1061,
 1062
 Loke Nath *v.* State of Orissa, 71, 195, 196,
 293, 543, 560, 1163
 Long Island Water Supply Co. *v.* Brooklyn,
 824, 866, 878
 Loom Chand *v.* Official Liquidators P. J.
 Bank Ltd. 1953 (1) M L J 514, 598, 601
 Lord Atkin *in* Sim *v.* Stretch, 315
 Lord Sumner's Reasoning *in* Bow Man *v.*
 Secular Society, 1159
 Los Angeles County *v.* Spensy, 460
 Louise Ville Ry. Co. *v.* Louise Ville Fire and
 Life Protection Assn., 122
 Louisiana State Examiners *v.* Fife, 105
 Lovell *v.* Griffin, 325, 335, 421, 767
 L. T. Swamiar *v.* Commr., H. R. E. Madras,
 799, 800
 Lumsden Club Ram Bagh Gardens *v.* Punjab
 State, 394, 495, 547
 Lyons *v.* Blankin, 958

M

Macherla Hanumanta Rao *v.* Andhra
 Pradesh, 217
 Machinder *v.* The King, 776
 Macintosh *v.* U. S., 769
 Mackay Telegraph and Cable Co. *v.* City of
 Little Rock, 123
 Mackertich *v.* Gupta, 877
 Mackonochi *v.* Penzance (Lond.), 974
 Madan Lal Jogodia *v.* The State, 76, 615
 Madanlal Kapoor *v.* State of Rajasthan, 68,
 80, 144, 292, 570
 Madathi Ahmed Haj *v.* Muthana Kunhirama
 Kurup, 83, 206
 Madhab Chandra Das *v.* R. T. Authority,
 144
 Madhya Bharat Cotton Association Ltd. *v.*
 Union of India, 209
 Madras Electric Tramway *v.* Ranganadham,
 985
 Magoun *v.* Illionis Bank, 99, 110, 147
 Magru *v.* Budge Budge Municipality, 1066,
 1070
 Mahabir Motor Co. *v.* State of Bihar, 979
 Mahalakshmayya *v.* Emperor, 623
 Mahamed Hanif Quareshi *v.* State of Bihar,
 788
 Mahammad Athar Rizvi *v.* State, 656
 Mahammad Hanif *v.* State of Madhya
 Pradesh, 436
 Mahammad Sheriff Hamdani *v.* Central
 Exam. Board, 1014
 Mahammad Sudhan *v.* State, 1047
 Maharaja Kishangarh Mills Ltd. *v.* State of
 Rajasthan, 526, 856, 901

Maharaja of Jeyhpur *v.* Patnaik, 98
 Maharaja Shri Umaid Mills Ltd. *v.* State of
 Rajasthan, 548
 Maharaj Umeg Singh *v.* State of Bombay,
 1013
 Maharashtra Sugar Mills *v.* State of Bombay,
 978
 Mahboob Khan *v.* Dy. Commr., Lakhimpur,
 559
 Mahbub Begum *v.* Hyderabad, 67, 487, 877,
 1176
 Mahbub Begum and Others *v.* State of
 Hyderabad, 119
 Mahendra Bahadursing *v.* State of M. B., 77,
 493, 507, 990
 Mahendra Lal Chakraborti *v.* Union Terri-
 tory of Tripura, 1127
 Maheshwari Devi Jute Mills Ltd., Kanpur
v. Labour Appellate Tribunal, 658
 (The) Maheshwari Devi Jute Mills Ltd.,
 Kanpur *v.* Lahore Appellate Tribunal, 81
 (The) Maheshwari Devi Jute Mills Kanpur *v.*
 The Labour Appellate Tribunal, 206
 Mahindra Mohan *v.* State of Assam, 855
 Mahindra Mohan Lahiri *v.* State of Assam,
 901
 Mahindar Pratap Singh *v.* Director of
 Health Services, A I R 1956 Punj 81,
 603
 Mahler *v.* Eby, 264 U S 32, 576
 Mahmud Naboo *v.* State of Travancore
 Cochin, 895
 Mahmed Rasin *v.* Town Area Committee,
 Jalalabad, 23
 Mahodayal Premchand *v.* Commercial Tax
 Officer, 1006
 Makhan Singh *v.* State of Punjab, 652, 654,
 674 698, 699, 711,
 Makoy *v.* South Carolina, (1915) 237 U S
 180, 576
 Malabati Tea Estate *v.* Bhakta Munda, 1006
 (The) Mala Bati Tea Estate *v.* Smt. Budhni
 Munda and Others, 1148
 Malbury *v.* Madison, 28
 Maledath *v.* Commr. of Police, 678
 Mahari Ramji *v.* Emperor, 964
 Malik *v.* Emperor, 685
 Malik Khizar Hayat Khan Tiwana *v.*
 Punjab Province, 891
 Mallatt *v.* North Carolina, 181 U S 589,
 577
 Mallela Surnaganarayana and Others *v.* Vijay
 Commercial Bank Ltd., 1131, 1132
 Maloji Rao *v.* State of M. B., 883
 Management of Western India Match Co.
 Ltd. *v.* Industrial Tribunal Madras, 1033
 Manak Lal *v.* Prem Chand, 979
 Manaklal Advocate *v.* Dr. Premchand Singh,
 1031
 Mangal Sain *v.* State of Punjab, 972
 Mangal Karwa *v.* State of Madhya Pradesh,
 862
 Manhar Lal *v.* State 163
 Mani *v.* District Magistrate, 680, 652
 Manilal *v.* Mondal, 973
 Manjulon *v.* Pradhan, 982
 Mann *v.* Nash, 550
 Mannar Gan *v.* Emperor, 685

- Mannava Venkayya *v.* K. Ghinna Punniiah, 700
 Manohara Jakat Khalak Dana and Others *v.* The Kuch Government, 436
 Manohar Ramakrishna *v.* G. G. Desai, 75, 891, 897, 907
 Manohar Singh *v.* State of Rajasthan, 39, 50, 877, 900
 Mansoor *v.* T. C. Govt, 922
 Manulal *v.* Chakradhar Hans, 504
 Manyamma *v.* Municipal Commissioner Hyderabad, 1113
 Manzur Hassan *v.* Sd. Muhammad Zaman, 406
 Maqbool Husain *v.* State of Bombay, 592, 596, 601, 652, 655
 Maqbulunissa and Another *v.* Union of India, 968
 Maqubunnissa *v.* Union of India, 992
 Marais *v.* General Office Commanding, 1045
 Marallis *v.* Chicago, 105, 123
 Marcus Brown Holding Co. *v.* Fieldman, 483
 Mareppa Ningrappa Kambar *v.* Emperor, 621
 Marks & Hass Jeans Clothing Co. *v.* Watson, 325
 Marsh *v.* Alabama, 770
 Marshall *v.* Blackpool Corpn., 95, 650
 Martin *v.* Mackonochie, 975
 Martin *v.* Struther, 323, 768, 770
 Martin & Co. *v.* Faiyas Hussain, 405
 Martin Burn Ltd. *v.* R. N. Banerjee, 1032
 Maryland *v.* Soper, 950
 Mase Hulla *v.* Abdul, 981, 984
 Masses Pub. Co. *v.* Patten, 325
 Master Tara Singh *v.* The State, 64
 Mastram *v.* State of H. P., 861
 Masud Alam *v.* Commissioner of Police, 777
 Masum Ali *v.* Custodian of Evacuee property, 976
 Mathai Manjuran *v.* State, A I R 1952 T C 556, 595, 600, 601
 Mathi Manyooran *v.* State, 62
 Matrumal *v.* Chief Inspector, 72, 543
 Matrumal Sharma and Another *v.* The Chief Inspector of Shops and Commercial Establishments, U. P. Kanpur, 567
 Maycr *v.* Pea Body, 1042, 1043, 1045
 Mazur *v.* Zaman, 404
 M. B. Cotton Association *v.* Union of India, 1169
 M. B. Namazi *v.* Deputy Commissioner of Evacuee Property, 65, 242, 511, 855, 884
 M. B. Namazi *v.* Deputy Custodian of Evacuee Property Madras and Others, 180, 196
 Mc Cabe *v.* Atchison, 808
 Mc Carthy *v.* Arndstein, 266 U S 34, 41: 606, 608
 Mc Clinton *v.* Commonwealth, 869
 Mc Cready *v.* Virgunie, 228
 Mc Donald *v.* Massachussets, (1901) 180 U.S. 311 : 576, 580
 M. C. Donnell *v.* King Emperor, 384
 Mc Donough *v.* Goodcall, 123 A L R 1205: 577
 Mc Erlain *v.* Taylor, 122
 Mc Govern *v.* N. Y. 907
 Mc Kane *v.* Durstone, 637
 Mc Kay Jewellers *v.* Bowron, 104
 M. C. T. Muthia Chettiar *v.* Commr. of I. T., 1117
 M. C. V. S. Arunachala Nadar *v.* State of Madras, 1127, 1128
 Md. Safi *v.* State of West Bengal, 883, 895
 Md. Habibuddin *v.* Govt. of Hyderabad, 129
 Meads *v.* Emperor, 1039, 1044
 Meads *v.* K. Emp., 1044
 Meads *v.* King, 1044
 Meddleton *v.* Texas Power and L. Co., 308
 Meenakshi *v.* State of Madras, 871
 (Sree) Meenakshi Mills *v.* State of Madras, 75
 Meenakshi Mills *v.* Visvanatha Sastri, 140
 Meeraj-ud-din *v.* Director of Kashmir Food Control, 1014
 Megh Raj *v.* Allarakhia, 363, 649
 Mehar Singh *v.* The State, 711
 Mekhan Singh *v.* State, 716
 Merwar Textile Mills Ltd. Bhilwara *v.* Union of India, 213
 Meson *v.* United States, (1917) 244 U S 362, 605
 Messrs. Bharat Board Mills Ltd. *v.* The Regional Provident Fund Commissioner, 64, 528
 Messrs Binjaraj *v.* Union of India, 37
 Messrs Calcutta Chemical Co. Ltd. *v.* The Asst. Collector of Customs and Others, 1149
 Messrs D. S. & G. Mills *v.* The Union of India, 1113, 1129
 Messrs Ghaico Mall & Sons *v.* The State of Delhi, 1095
 Messrs Hazari Lal Bhanna Mal *v.* State of H. P., 310, 564, 990
 Messrs India Coffee & Tea Distributing Co. Ltd. *v.* The State of Madras, 209
 Messrs Indian Iron and Steel Co. Ltd. *v.* Their Workmen, 1031
 Messrs J. N. Prusty & Bros. *v.* State of Orissa, 1007
 Messrs Karam Chand Thappar & Bros. *v.* Dr Vijayanand and Others, 151
 Messrs Murugan & Co. Tuticorin by Partner Sudalai Muthu Pillai *v.* State of Madras, 223
 Messrs S. N. Transport Co. *v.* State Transport Authority, 1001
 Metropolitan Trust Co. *v.* Jones, 471, 500
 Mewalal *v.* Emperor, 685
 Meyer *v.* Nebraska, 9, 18, 301, 520, 808
 M. Gopalkrishna Naidu *v.* State of Madhya Pradesh, A I R 1952 Nag 170, 598, 599
 Mhindra Mohan Lahiri *v.* State of Assam, 79
 M. H. Quareshi *v.* State of Bihar, 1093, 1105, 1113, 1135
 Middleton *v.* Texas Power and L. Company, 155, 187
 Mighell *v.* Sultan of Lahore, 112
 Miksh *v.* State of Manipur, 758
 Milakhraj *v.* Jagdish Chandra, A I R 1957 Raj 263 : 586
 Milap Chand *v.* Dwarka Das, 209
 Milkwagon Drivers *v.* Dairies, 411

- Milk Wagon Drivers Union *v.* Meapowmoor Dairies, 320, 360, 361
 Miller Brothers Co. *v.* State of Maryland, 548
 Millrom *v.* Harrison, 524
 Mincan *v.* Kahanmoker, 1045
 Minersville School District *v.* Gobitis, 768
 Minister of Health *v.* Rex, 826
 Minister of State for the Army *v.* Dalziel, 827, 869
 Minneapolis & Co. *v.* Bekurth, 1130
 Missouri Ex. Rel. Gaines *v.* Canada, 242, 810, 808
 Miss N. R. Chiranji Lal *v.* State of Bihar, 1127
 Missouri *v.* Lewis, 104, 123
 Missouri Pacific R. Co. *v.* Tucker, 635, 637
 Missouri Pacific Ry. Co. *v.* Nebraska, 867
 Mithal Lal *v.* State, A I R 1954 All 689 : 600
 Mithan Lal *v.* State of Delhi, 1142
 M. Keval Chand Sowcar *v.* State of Madras, 572
 M. K. Gopa'an *v.* The State of Madhya Pradesh, 198, 993, 1139, 1141
 M. K. Gopalan and others *v.* The State of Madhya Pradesh, 81
 M. K. Mills *v.* State of Rajasthan, 80
 M. M. Bashir *v.* State, 715
 M. Mohd. Ishwaq *v.* Commissioner of Income Tax, Delhi, 861
 Modern Match Industries *v.* L. A. T. I., 1001
 Mohamad Ali Allabax *v.* Ismailji, 962
 Mohamad Hussain *v.* The State of Hyderabad, 263
 Mohammad Abdur Rahiman *v.* Hyderabad State, 710
 Mohammad Anzar Hussain *v.* State of Bihar, 73, 159, 497, 564
 Mohammad Habibuddin *v.* Govt. of Hyderabad; 78, 203, 512
 Mohammad Habibuddin *v.* Govt. of Hyderabad Thro. Custodian, Evacuee Property, 489
 Mohammad Habibuddin *v.* Govt. of Hyderabad Through Custodian of Evacuee Property, 899
 Mohammad Hanif *v.* State of M. P., 76
 Mohammad Hussain *v.* Provident Fund, Inspector, 614, 615
 Mohammad Hussain *v.* The State, 205
 (K.) Mohammad Khassim *v.* Municipal Council, Ootacamund, 560, 568
 Mohammad Raza Ali Khan *v.* State of Uttar Pradesh, 76, 200, 920, 936
 Mohammad Razvi *v.* State of Hyderabad, 215, 657
 Mohammad Siddiqui *v.* State of U. P., 785
 Mohammad Subhan *v.* State, 750
 Mohammad Umar *v.* Amir Mohammad, 1126
 Mohammad Umar *v.* I. G. of Police, 217
 Mohammad Yasin *v.* Town Area Committee, Jalalabad, 66, 953
 Mohandalal Mitter *v.* Anando Kumar Mitter, 380
 Mohantal Jain *v.* Sir Sawaji Man Singh Sahib, 81
 Mohan Lal Saxena *v.* Emperor, A I R 1930 Oudh 497, 592
 Mohari Lal *v.* Corporation of Calcutta (1953) 57 C W-N 248, A I R 1953 Cal 567: 583, 585
 Mohasin Ali *v.* State of Bombay, 977
 Mohd. Din *v.* Thakur, 485, 492
 Mohd. Ishaq *v.* Union of India, 723
 Mohd. Ishaq Ilmi *v.* U. P. State, 393, 689, 692
 Mohd. Karar Ali and Others *v.* The State of U. P. 493
 Mohd. Kerar Ali *v.* State of U. P., 905
 Mohd. Yasin *v.* Dist. Magistrate, Kanpur, 571
 Mohd. Yasin *v.* Town Area Committee Jalalabad, 535, 536, 545
 Mohichandra *v.* ScCy. Local Self Govt., 981, 984
 Mohitlal *v.* The State, 721
 Mohita and Co. *v.* Visvanatha Sastri, 61
 (M/s) Mokandal Mandalal *v.* Director of Industries Pepsu Govt., 1128
 Mool Chand *v.* Emperor, 957
 Moolla Sons *v.* Rangoan Official Assignee, 24
 Moll Singh *v.* State, 724
 Moon *v.* Durden (1848) 2 Ex. 22, 579
 Mooney *v.* Holohan 149, 254
 Moore *v.* Dempsey, 635
 Moors *v.* Illinois; 14 How 13, 19: 586
 Moran Mar, B. Catholicos *v.* Paulo Avira, 1027
 Mordhwaj Singh *v.* Vindhya Pradesh State, 69, 904, 936
 Mordwaj Singh *v.* State of V. P. 83
 Morford *v.* Unger, 111
 Mormon-Church *v.* United States, 766
 Mortensen *v.* Peters, 1101
 Mothai Manjooram *v.* State, 310
 Moti Bai *v.* Kand Kari Chinnyya, 70
 Moti Bai *v.* State, 688
 Motilal *v.* Emperor, 408
 Moti Lal *v.* Govt. of Uttar Pradesh, 561, 971, 973
 Moti Lal *v.* State, 680, 979
 Moli Lal *v.* State of U. P., 310
 Moti Lal *v.* Uttar Pradesh, 547, 971, 976
 M. P. Industries Association *v.* Regional Provident Fund Commissioner, Bombay, 1112
 M. P. Nenon *v.* State, 80, 389, 397
 M. P. Sharma *v.* Satish Chandra, District Magistrate 611, 617
 M. P. Sharma & Others *v.* Satishchandra Dt. Magistrate, Delhi, 306
 M. R. Puttiah and Another *v.* Mysore city Municipality, 214
 Mrs. Godavari W/o Sham Rao Parulekar *v.* State of Bombay, 76, 731, 992
 Mrs. Mohan Kaur *v.* Custodian M. E. P., 925
 M/s. Bengal Chemical and Pharmaceutical Work Ltd. *v.* The Employees, 1149
 M/s. Mokandal Madanlal *v.* Director of Industries Pepsu Govt. 1128
 M. S. M. Sharma *v.* Shri Krishna Sinha, 1011, 1133
 (Pt.) M. S. M. Sharma, Editor of Searchlight *v.* Shri Krishna Sinha, 1164

M. Syed Mohammad & Co. *v.* State of Andhra, 1156
 Mt. Choki *v.* State, 255, 259
 Mugler *v.* Kansas, 124, 299, 302, 824
 Mugler *v.* State of Kansas, 164
 Muhammad *v.* State, 884
 Muhammad Safi *v.* State of West Bengal, 884
 Muir Mills *v.* Suti Mills Mazdoor Union, 1029
 Mukandi Ram *v.* Executive Engineer, A I R 1936 Pep. 40, 586
 Muktar Singh *v.* State of U. P., 914, 979
 Mukund *v.* Municipal Committee, 972
 Mulain Chand *v.* Municipal Committee, Kanti, 529
 Mulchand *v.* Mukund, 72, 979
 Mulchand *v.* Mul Kand, 292
 M. U. M. Services *v.* R. T. Authority, 975, 979
 Muneshwar Singh *v.* State, 688
 Munga Bai *v.* Hyderabad State, 876
 Municipal Board Lucknow *v.* Sardar Iqbal Singh, 1128
 Municipal Corporation *v.* K. C. Sen 975, 980
 Municipal Council Kumbakonam *v.* Ralli Bros., 558
 Munn *v.* Illinois, 480, 522, 537, 642, 645, 822
 Munna Lal *v.* Harold Scott, 984
 Murat *v.* Province of Bihar, 680
 Murdock *v.* Pennsylvania, 756, 767, 770
 Murid Hussein *v.* Emperor, 685
 Murli Tahil Ram *v.* T. Asoomal & Co. 495
 Murray *v.* La Guardia, 510
 Mushra *v.* Patti, 988
 Mushram *v.* Patil, 978
 Muthuvamalinga Theyar *v.* State of Madras, 725
 Muthuvelu *v.* State of Madras, 223
 M. Y. Shariff *v.* Hon'ble Judges of the Nagpur High Court, 1031
 Mzaki *v.* State of Bihar, 489

N

Naba Kumar Seal *v.* State of West Bengal 896, 907
 Nabhir Rajiah *v.* State of Madras, 828
 Nabinchandra Gantayat *v.* State, 394, 558
 Nagalinga Nadar Sons *v.* A. T. H. L. C. W. U. A. 75
 Nagappa *v.* Basappa, 999
 Nagendra Nath *v.* Commissioner, Hills Division and Appeals, Assam, 1004, 1005, 1009, 1010
 Nagpur K. K. Samaj *v.* Corporation of City of Nagpur, 1128
 Nain Sukh Das *v.* State of U. P., 68, 231, 968, 991, 993, 1176
 Nakudali *v.* Jayaratne, 1170
 Nalini *v.* Ananda Sankar, 977
 Namazi *v.* Dy. Custodian, 489, 1024
 Namboodripad *v.* State of T. C., 211
 Nanag Ram *v.* Ghinsilal, 979
 Nanak *v.* Crown, 685
 Nanda *v.* Board of Trustees, 973

Nandeswar Chakravarthi *v.* State of Assam, 912
 -Nandilal Varma & Co. *v.* Ambalal G., 558, 689
 Naranjan Singh *v.* State of Punjab, 640, 679
 Narasaraopeta Electric Corporation Ltd. *v.* The State of Bombay, 75
 Narasayya *v.* Hyderabad State, 721
 Narasimhamurthy *v.* The State, 706
 Narasimha Reddy *v.* Dist. Magistrate. Gud-dapah, 517
 Nara Singh Mahapatra *v.* Emperor, 9 Cut Lt 95, 595
 Narayan *v.* State of Punjab, 967
 Narayana *v.* State of T. C., 800
 Narayana Chetty *v.* I. T. Officer, 1006
 Narayana Deo *v.* State of Orissa, 81
 Narayana Doss *v.* T. Neddari Rao, 789
 Narayanamma *v.* Hyderabad, 694
 Narayanamma *v.* Hyderabad State, 710, 721
 Narayanan Nambudripad *v.* State of Madras, 783, 794, 1174
 Narayanaraju *v.* Secretary, Government of Madras, 728
 Narayana Rao Sanas *v.* Union of India, 1119
 Narayanaswami Naidu *v.* Inspector of Police, 651, 710, 740
 Narayan Chandra Ghose *v.* Ananda Bisni and others, 78
 Narayanoprasad Jhunjunwalla *v.* Indian Iron & Steel Co., 78, 486, 856, 900, 1130
 Narayan Pershad *v.* State of Hyderabad, 795
 Narayan Prasad Jhunjunwala and others *v.* The Indian Iron and Steel Co. Ltd., 202
 Narayan Rao *v.* Solomon Moses, 380
 Narayan Singh Nathawan *v.* State of Punjab, 699
 Nar Bahadur Gurange *v.* Anil Krishna Bhtacharya, 495
 Naren Babu *v.* State of W. Bengal, 692
 Naresh *v.* Union of India, 985
 Narsingh and another *v.* State of U. P., 1027
 Narton *v.* Shelby County, 928
 Nasiran Bai *v.* State, 445
 Nasrullah *v.* State, 211
 Nata Bar Jana *v.* State, 211
 Nataraja *v.* Madras State, 875, 891
 Nath *v.* C. I. T., Delhi and Rajasthan and another, 1146
 Natha Moni *v.* Visvanatha, 957
 Nathamuni *v.* Biswanath, 983
 Nathela Samathu Chetty *v.* Collector of Customs, 1128
 Nathmal *v.* Board of Revenue, 976
 Nathmal *v.* Commissioner Civil Supplies 66, 546, 564
 Nathmal and another *v.* Commissioner of Civil Supplies Rajasthan, 160, 563, 894
 Nathu *v.* Ralla, 511
 Nathu Bhai Gandabhai *v.* State of Bombay, 937, 945
 National Carbon, Co., Ltd. *v.* M. N. Gan, 1085
 National Coal Co. *v.* Dave, 978, 980
 National Labour Relations Board *v.* Jones & Laughon Steel Corporation, 1062
 National Relation Board *v.* Fairsteel Metallurgical Corporation, 360

Natural Gas Pipeline Co. v. Slaterry, 635
 Navi Vehoo v. Narotam Das Candas, 380
 Nazimuddin v. State, 917, 1126
 N. Bakhavatsalam Iyenger, v. Secry. Andhra
 P. S. Commission, 215, 265
 N. Bakshi v. Acct. General, 862
 (Dr.) N. B. Khare v. State of Delhi, 75, 292,
 451, 720
 N. Dasai Goundar & Co. Madras v. Dy.
 Controller of Imports, Customs House,
 Madras, 569
 Near v. Minnesota, 18, 324, 325, 327, 337
 Nebbia v. New York, 482, 520, 521, 522, 537
 Nebraska Ex. Rel Ralston v. Turner, 524
 Neelakanth Mali v. Jagannath Singh, 862
 Nekhilal v. Queen Empress, 685
 Nek Mohammad v. Emp., 705
 Nek Mohammad v. Prov. of Bihar, 776
 Nelson v. Tilley, 524
 Nelungaloo v. Commonwealth, 829
 Nesamony v. Virghese, 981
 New v. United States, 767, 770
 New Motor Transport Co. v. R. T. Author-
 ity, 33
 New Prakash Transport Co. Ltd. v. New
 Sawarna Transport Coy. Ltd., 1010
 Newspapers Ltd. v. Industrial Tribunal,
 978
 Newspapers Ltd. v. State Industries Tribunal,
 1001
 New York Cent.-R. Co. v. White, 124
 New York Excel Bryant v. Zimmerman, 105,
 121, 417,
 Nga Myat Thauang v. Emperor, A I R 1935
 Rang 436, 595
 N. Gopalan v. Central Road, Traffic Board,
 Trivandrum, 1006
 N. Gopalan v. State of Madras, 78, 901
 Nibaran Chandra Baz v. Mahendra Nath,
 1025
 Nightingale v. Stockdale, 385
 Niharendu v. K. E., 348
 Nimai Ghand Bhabak v. State, 501
 Niren Babu v. State of W. Bengal, 723, 724
 Nisar Ahmed v. Union of India, 454
 N. Kandasami Pillai v. Executive Officer,
 Panchayat Board, A. H. M., A I R 1947
 Mad-306, 595
 Noble State Bank v. Haskell, 299, 522,
 Noor Mohammad v. The State, 445
 Nordone v. Goldman, 18
 Norris v. Alabama, 26
 Northern Pacific Ry. v. N. Dakota, 922
 Northern Securities Co. v. United States, 413,
 417, 490
 Norton v. Shelly County, 28
 Norvis v. Mayor and City Council of Balti-
 more, 240, 247
 N. P. Ponnusamy v. Returning Officer
 Nawakkal, 289
 (Mis) N. R. Chiranjilal v. State of Bihar,
 1127
 N. S. Chetty v. Collector of Customs, 1007
 N. Soundaraja Iyer v. Sub-Collector of
 Dindigul, 481
 Nunne Machar v. State, 123
 Nusserwanji Balsara v. State of Bombay, 33,
 65, 195

O

Official Liquidator v. Shri Krishna Rao,
 1007
 Ohio Oil Co. v. Indian, 493
 O Kelly v. Harvey, 402
 Ominia Commercial Co. Inc. v. U. S., 823
 Om Prakash v. Emperor, 293
 Om Prakash v. King Emperor, 367
 Om Prakash v. State of Punjab, 810, 1049,
 1069
 Om Prakash v. The State, 30, 71, 150, 212
 Om Prakash Dhri and Others v. The State of
 Punjab, 265
 Oslen v. Nebraska, 522, 523
 Ouseph Ouseph v. Minister of Food, 957
 Ownby v. Morgon, 123
 Oynam Mirahari Singh v. Inspector of
 Schools, Manipur, 1006

P

Padyachi v. State of Madras, 891
 Pakhar Singh v. State, 617
 Palko v. Connecticut, (1937) 302 U S 319,
 325 : 605, 616
 Panch Gujar Gaur Brahmamas v. Amar Singh,
 70
 Pandarathil v. Collector, 915
 Pandit Sharma v. Sri Krishna Sinha and
 others, 1124
 Pandurang Kashi Nath Mose v. Union of
 India, 1106, 1123
 Panna Lal Binraj v. Union of India, 997,
 1002, 1109, 1160
 Panna Ram Pat Ram v. State, 722
 Papu Rao v. State, 979
 Paraju v. General Manager, 983
 Paresch Chandra v. Jogendra, A I R 1927 Cal
 93 : 609
 P. Armugham v. State of Madras, 202, 601
 Prmugam and Others v. State of Madras,
 77
 Parry & Co. v. Commercial Employee's Assn.,
 975, 980, 999
 Parry & Co. Ltd., Madras v. Commercial
 Employees' Association, 988
 Parshram Damodhar v. State of Bombay, 217,
 487, 938, 939
 Parsu Ram Das v. State, 656
 Pattabi v. Covinda, 978
 (Mis.) Pattammal Armugam v. The Chief
 Presidency Magistrate, Madras, 65
 Patterson v. Wolman, 122
 Paul v. Virginia, 1130
 Paul v. Wheat Comms, 651
 Paulin Krishna v. Sishupati, A I R 1953 Cal
 85, 598
 Paulin Krishna Dutt v. Satyaranjan Bhatta-
 charjee, A I R 1953 Cal 599 : 585
 Pawell v. Ala Bama, 634
 Pawell v. Pa, 645
 Pazundaung Bazar Go. Ltd., v. Municipal
 Corporation of Rangoon, 139
 Pazundaung Bazar Co. Ltd. v. Municipal
 Corporation of the City of Rangoon, 558
 P. Balakotiah v. Union of India, 425
 P. B.N.C. Committee v. Government, Andhra
 Pradesh, 911

- P. C. Ray & Co. (India) Private Ltd. v. I. T. O. and Another, 1148
- P. D. Shandasimi v. Central Bank of India, 52, 289, 1167
- Pennekamp v. Florida, 324, 337
- Pennsylvania Coal Co. v. Mohan, 899
- Pennsylvania Hospital v. Philadelphia, 869
- People v. Budd, 522
- People v. Griswold, 122
- People v. Love, 524
- People v. Pearson, 770
- People Ex Rel Pincers v. Adams, 110 A L R 1303; 578
- People of the State of Illinois v. Chicago Milwaukee & Paul Railway Company, 537
- People of the State of Illinois Exrel McCollum v. Board of Education, 766, 1076
- (The) People's Bus Service Ltd. v. State of Pepsu, 163, 563
- (The) People's Bus Services Ltd. v. The State, 1076
- Permsri Das Bhanna Mal v. Amritsar Improvement Trust, 81, 207
- Per obiter in Smt. Anjali Roy v. State of West Bengal, 258
- Per Scott. Ltd., Blackpool Corporation v. Locker, 91
- Pete Hernandez v. State of Texas, 115
- Philiph v. Govt. of T. C., 310
- Phillips v. Emperor, 618
- Phillips v. Eyre (1870) 69 B K, 581, 1041, 1044, 1045
- Phoenix Assurance Co. Ltd. v. Minister of Town and Country Planning, 1010
- Pierce v. Society of Sisters, 799, 808, 815
- Pierce Oil Corp. v. Phoenix Refining Co., 120, 636
- Pilko v. Connection, 124
- Pipa Pal v. University of Calcutta, 979
- Pipraich Sugar Mills, Ltd. v. P. S. Mills Mazdoor Union, 1031
- Pithapuram T. G. C. & S. M. Union v. State, 1171
- Pittsburgh Etc. R. Co. v. Backers, 637
- P. J. Joseph v. Foreign Liquors Ernakulam, 30
- P. J. Joseph Foreign Liquors Ernakulam v. Asstt. Excise Commissioner Ernakulam, 220
- Plessy v. Fergusson, 249
- P. L. Lakhanpal v. State of Jammu and Kashmir, 750
- P. Mathurai Pillai v. State of Madras, 222
- P. Mathurai Pillai and Others v. State of Madras, 69
- P. M. Bramadathan Namboodripad v. Cochin Devasvom Board, 25, 163, 248, 475, 1000
- P. Narasimha Reddy v. District Magistrate, 78
- P. N. Krishna Ayyar v. Municipal Council, Kunnamkulam, 555
- Ponnusamy v. Returning Officer Nanakkal, 988
- Pooran Mistry v. The State of U. P., 212
- Portsmouth Harbour Co. v. U. S., 866
- Porter v. Rochester Case, 974
- Powell v. Alabama, 662
- Powell v. Pennsylvania, 164, 298
- Power Mfg. Co. v. Sounders, 104, 124, 1111
- P. P. Kuttikeya v. State of Madras, 84, 205, 544
- Prabhabati v. D. M. Allahabad, 495, 971
- Prabhat v. D. C. Kumrup, 691
- Prafulla Mohan Mukherjee v. I. G. of Police W. B., 1149
- P. Raghunadha Rao v. State of Orissa, 248, 263, 813, 1047
- Prahlad v. State, 32, 64
- Prahlad v. State of Orissa, 696
- Prahlad Krishna v. State of Bombay, A I R 1952 Bom 1, 53 B L R 717 : 74, 583
- P. Rajangam v. State of Madras, 1148
- Pranballav Saha and Another v. Sm. Tulsibala Dassi and Another, 785
- Pran Krishna Kammar v. Junior Assessor, Sibarampore, 784
- Pran Krishna Kamar v. Junior Assessor Sibasampist, 83
- Prashai v. Dwarakadass, 980
- Pratap Singh v. State of Rajasthan, 247
- Pratap Singh v. The Allahabad Bank Ltd., 64
- Pratinidhi Sabha v. State of Bihar, 814
- Prattipati Dandaiah v. Nori Venkatrama Dikhatalu, 83, 206
- Prem Dutta Paliwal v. Supdt, Central Prison Agra 658, 692, 700
- Prem Mahajan v. State of Bihar, 936
- Prem Nath Bazaz v. Union of India, 723
- Prem Shankar v. U. P. Provincial Co-operative Bank, 77, 500
- Prem Singh v. Dy. Custodian General of Evacuee Property, 1002
- Prescott v. Birmingham Corporation, 212, 240
- Pritam Singh v. The State, 1028
- Prithish v. The State, A I R 1952 Cal 319, 598, 600, 602
- Prithi Singh v. State of Pepsu, 199, 507, 901
- Prithvi Singh v. State, 856
- Pritip Pandurang Pitale v. State of Bombay, 905
- Provatt Kumar Ghosh v. State of West Bengal, 216
- Province of Bombay v. Kushal Dass, 883, 885, 975, 977
- P. R. Ranade v. State of Vindya Pradesh, 989
- P. S. Mills v. Mazdoor Union, 1032
- Pt. Bhangopal Tewari v. State of U. P., 224
- P. Thambiran Padayachi and Others v. State, 893
- Pt. M. S. M. Sharma, Editor of Searchlight v. Shri Krishna Sinha, 1164
- Public Prosecutor v. Gopalan, 968
- Public Prosecutor v. K. C. Ayyappan Pillai, A I R 1957 Mad 337-1953 (1) M L J 157, 582, 584
- Public Prosecutor v. Mari Mathu Gowndan, 623
- Public Prosecutor v. Paramasivam and others, 623
- Pulin Krishna v. Sishupati, (1952) 56 C W N 585, 600
- Pulin Krishna Dutt v. Satya Narayan Bhattacharjee, 78
- Pulko v. Connecticut, (1937) 302 U S 319, 587
- Pumpelly v. Green Bay Co., 822, 866

- Punjab National Bank *v.* Sen, 980
 Punjab National Bank *v.* Soorajmull, 975
 Punjab State *v.* Inder Singh, 79, 485, 512
 Puralal Lakhnapal *v.* Union of India, 701, 724, 733
 Purity Extract and Tonic Company *v.* C. C. Lynch, 299
 Purnananda *v.* Emperor, A I R 1939 Cal 65, Mohsena Khatun, 43 G W N 893: 610
 Purushottam *v.* B. M. Desai, 1139, 1141
 Purustottam *v.* Venkatappa, 74
 P. Venkateswarlu, a detenu in the Central Jail at Cuddalore *v.* Dt. Magistrate Guntur & Superintendent, Central Jail Cuddalore, 964
 P. V. Sivtirajan *v.* Union of India, 1128, 1116.
 P. V. S. Venkatachalam *v.* P. V. S. Kabala Murthy, 494
 Pyarelal *v.* State; 678, 698, 699, 718

Q

- Qazim Rizvi *v.* State of Hyderabad, 1159
 Qasim Razvi *v.* State of Hyderabad, 39, 1107
 Queen *v.* Amir Khan, 17 Suth W R Gr 15; 9 Beng L R 36: 595
 Queen *v.* Clarke, 963
 Queen *v.* Hecklin, 372
 (The) Queen *v.* St. Mary White-Chapel, (1848) 116 E R 811 at 814, 581
 Queen Empress *v.* Ramnaik, 1887 Rat 318: 595

R

- R. *v.* Alfred Carlile, 372
 R. *v.* Axbridge Corporation, 976
 R. *v.* Babu Lal, 622
 R. *v.* Bank of England, 969
 R. *v.* Barracrough, 371
 R. *v.* Bates, (1911) 1 K B 964, 591
 R. *v.* Bodmin Corporation, 957, 970
 R. *v.* Bolten, 976
 R. *v.* Bowman, 6 C and P 337, 591
 R. *v.* Briggs, 981
 R. *v.* Brisbane Licensing, 59
 R. *v.* Brixton Prison (Governor), 963
 R. *v.* Brooke & Fladgate Gregory, 964
 R. *v.* Chapman, 650
 R. *v.* Clark, 372
 R. *v.* Crundon, 372
 R. *v.* Curl, 371, 372
 R. *v.* D'con, 365
 R. *v.* Durury, (1848) 3 C and K 193, 589, 590
 R. *v.* Ely (Bishop), 970
 R. *v.* Gir Butt, (1856) D and B 166, 589
 R. *v.* Gott, 315
 R. *v.* Gregory, 386
 R. *v.* Grim Wood, (1986) 60 J P, 809: 590
 R. *v.* Halliday, 650, 633
 R. *v.* Higgins, 386
 R. *v.* Home Secretary *ex parte* O'Brien, 958
 R. *v.* Hunhugton Confirming Authority, 95
 R. *v.* Jones, 981
 R. *v.* King, (1897) 1 Q B 214, 590
 R. *v.* Kingston-upon-Hull Tribunal, 98
 R. *v.* Lawisham Wrion, 969
 R. *v.* Lester, 524
 R. *v.* Lunus E. Commissioners, 970

- R. *v.* Marsham, (1912) 2 K B 362, 589, 590, 591
 R. *v.* Meale, 401
 R. *v.* Morn Mill Camp. *ex parte* Ferguson, 957
 R. *v.* Peter, 365
 R. *v.* Petersborough Corporation, 969
 R. *v.* Plymouth & Dartmore Coy., 970
 R. *v.* Ramsay, 772
 R. *v.* Reed, 371, 372
 R. *v.* Scheiver, 693
 R. *v.* Sedley, 371, 372
 R. *v.* Sernc, (1888) 107 Cent Crim 418, 589
 R. *v.* Sheridan, 26 Cr App R I, 590
 R. *v.* Superintendent of Vine Street Police Station *ex parte* Libman, 632, 663
 R. *v.* Vedercomb, (1796) 2 East P C 579, 589
 R. *v.* Waddington, 315, 772
 R. *v.* Ward, 981
 R. *v.* Whitewell, 981
 R. *v.* Woolston Fitzgibbon, 772
 R. *v.* Wright, 963
 Rabindra Nath Mitra *v.* Chief Secry. Government West Bengal, 424
 Radhakrishna Mills Ltd. *v.* Special Tribunal Madras, 1079
 Radha Nath Dhare *v.* The State, 78
 Radharaman Das *v.* State, 84
 Radharaman Das *v.* State of West Bengal, 488
 Radheshyam Khare and Another *v.* The State of Madhya Pradesh, 1146
 Rag *v.* Fletcher, 975
 Raghavendra Kripal *v.* Municipal Board, 1113
 Raghavendra Singh *v.* Pushpendra Singh, 862
 Raghubir Singh *v.* Court of Wards, 68, 292, 513, 935, 1167
 Raghubir Singh *v.* State of Ajmer, 941
 Raghuramula *v.* State of Andhra Pradesh, 814
 Ragina *v.* Sheikh, 975
 Raigarh Jute Mills Ltd. *v.* Eastern Railway, 1033
 Raja Bhariabendra Narayan Bhup *v.* State of Assam, 921
 Raja Hari Singh *v.* State, 68
 Raja Hari Singh *v.* State of Rajasthan, 207
 Raja Harmahendra Singh *v.* The Punjab State, 79
 Raja Harmakhedra Singh *v.* The Punjab State, 58, 199
 Rajah V. V. M. G. Yachindra *v.* Rajah V. V. Sarvagna Krishna Yachindra, 214
 Raja Jagavcera Rama M. *v.* E. Naicker Ayyan, 81
 Raja Jagaveera Rama Muthu Kumara Venkatesaware Ettappa Naicker *v.* State of Madras, 905
 Raja Jagaveera Rama M. Venkateshwar Ettapur, Zamindar of Ettayapuram *v.* State of Madras, 921
 Raja Kulkarni *v.* State of Bombay, 74, 81, 197, 289, 417, 538
 Rajamuthu Koil Pillai *v.* Penasami Nadar, 620
 Raja of Bobbili *v.* State of Madras, 71, 73, 484, 863, 875, 893, 907

- Rajasthan *v.* Nathmal, 1169, 1175
 Raja Surya Pal Singh *v.* State of U. P., 891, 920, 944
 Raja Surya Pal Singh *v.* U. P. Government, 506, 897
 Raj Bahadur *v.* Legal Remembrancer to the Government of West Bengal and Others, 657
 Raj Bahadur *v.* Leg. Remembrancer, Government of West Bengal, 78, 672, 1047
 Rajendra Swami ji *v.* State of Andhra; 504
 Raj Krishna Bose *v.* Binod Kanungo, 1029
 Raj Kumar Singh *v.* Tincowri Mazumdar, 685
 Raj Narain Singh *v.* Atmaram Govind, A I R 1954 All 319, 600
 (Sri) Raj Narain Singh *v.* Dist. Magistrate Gorakhpur, 33, 408
 Rajni Kant Varma *v.* State, 396
 Raj Rajendra Maloji Rao Shitole *v.* State of M. B., 77, 900, 920, 1076
 Raj Rajendra Maloji Rao Shitole and Others *v.* State of M. B., 68
 Raj Rajeswari *v.* State of U. P., 61, 507
 Raj Sahibn Sher Singh *v.* State of Rajasthan, 207, 515
 Rakhaldoss *v.* S. P. Ghose, 984
 Rakhladas Mukherji *v.* Ghose, 956
 Rama Ayyar *v.* Nataraja Ayyar, 963
 Ramachandra *v.* Hiramba, 543
 Ramachandra *v.* Secretary of State, 869
 Ramachandra Deb *v.* State of Orissa, 796
 Ram Adhar *v.* State, 696, 698, 730, 978
 Rama Krishna *v.* Radha Mal, 485, 493
 Rama Krishna Dalmia *v.* Justice Tendolkar, 1113, 1114
 Rama Krishna Das *v.* State of Bihar, 486, 784
 Rama Krishniah *v.* President District Board, 66
 Ramalinga *v.* Sundara, 778
 Ramam Mal *v.* Vijayaraghavalu, 964
 Raman and Raman *v.* State of Madras, 978, 1000, 1129
 Ramanathan *v.* State of Hyderabad, 711
 Raman Das *v.* State of U. P., 72, 151, 876, 889
 Ramani Kanta *v.* Gauhati University, 816
 Ramani Mohan Sen *v.* Sm. Nilaby Barani Debi, 61
 Ram Aniranjan *v.* Addl. Dist. Magistrate, 983
 Raman Lal *v.* Municipal Board, 973
 Raman Lal Rathi *v.* Commissioner of Police, Calcutta, A I R 1952 Cal 26 : 74, 598, 601, 678, 695, 707, 714, 722, 957,
 Ram Anyan *v.* Election Commr., 1014
 Ramasami *v.* Official Receiver, 1026
 Raina Saroopadas *v.* Bihar State Board of Religious Trust, 504
 Rama Shankar *v.* State, A I R 1954 All 562, 222, 585
 Ramayya *v.* Lakshmi Naryana, 98
 Ramayya *v.* State of Madras, 984
 Rambhaji *v.* Punjab State, 679
 Ram Bhan *v.* Raj Bhan, 1024
 Rambilas Gupta *v.* Rex, 709
 Ram Chander *v.* Allahabad University, 215
 Ram Chandra *v.* Hiramta Kumar, 72
 Ram Chandra *v.* State of Orissa, 994
 Ram Chandra Deb *v.* The State of Orissa, 1127
 Ramchandradu *v.* Gulab Chand, A I R 1958 And Prad 707, Relied on A I R 1953 S C 325 : 604
 Ramchandra Krishnaji Dhagle *v.* Janardan Krishnappa Marwar, 213, 513
 Ramchandra Palai *v.* Hiramba Kumar Pal and Another, 563
 Ramchandra Palai *v.* State of Orissa, 215, 563
 Ramcharan Lal *v.* State of V. P., 986
 Ramcharan Prasad *v.* State of U. P., 477
 Ram Dayal *v.* Shanker Lal, 76, 542
 Ram Dubey *v.* Government of M. B., 73, 818, 917, 933
 Ramesh *v.* Prov. of Bombay, 650
 Ramesh Chandra *v.* State Govt. of U. P., 1123
 Ramesh Chandra *v.* The State, A I R 1955 Bom 346, 582
 Ramesh Chandra Dey *v.* State of Assam, 548
 Ramesh Thapper *v.* State of Madras, 33, 65, 301, 302, 304, 955, 967
 Rameshwar *v.* Dist. Magistrate, 1170
 Rameshwar Mehta *v.* The State, 409
 Rameshwar Prasad Kedari Nath *v.* The Dist. Magistrate, 546
 Rameshwar Proshod *v.* Commissioners, Land Reforms and Jagirs M. B., 1011
 Ram Gopal *v.* State of Bhopal, 658
 Ram Hari *v.* Nilmoni Das, 73, 485
 Ram Hari Mandal *v.* Nilmoni Das, 438
 Ram Jawaya *v.* State of Punjab, 545
 Ramjiban Gurchait *v.* State of West Bengal, 83, 904
 Ramjidas *v.* State of Rajasthan, 916
 Ramjilal *v.* Income Tax Officer Mohinder Garh, 72, 830, 896, 924, 953, 957
 Ramji Lal *v.* I. T. O. 862, 1168
 Ramji Lal *v.* Rex, 964
 Ramji Lal *v.* State of U. P., 370
 (Sm.) Ram Katori *v.* Rent Controller and Eviction Officer, Agra, 77, 500
 Ram Kishan *v.* The State 66, 221, 659
 Ram Kishen Tondon *v.* Central Bank of India, 1005
 Ram Krishan *v.* State of Delhi, 714, 1173
 Ram Krishna *v.* Radham Lal and Others, 31, 52
 (Dr.) Ram Krishna Bharadwaj *v.* State of Delhi, 655, 719
 Ram Krishna Dalmia, *v.* Shri Justice S. R. Tendalkar, 1013
 (B.) Ram Lal *v.* State, 68, 84, 493
 Ram Manohar Lohia *v.* Supdt., C. P. Fatehagarh, 62, 729
 Ram Nandan *v.* State, 1124
 Ram Narain *v.* State, A I R 1956 All 141, 603
 Ram Narayan Singh *v.* State of Delhi, 968, 991, 998
 Ram Narunjan *v.* Additional Dist. Magistrate, 953
 Ramnath Diwan Chand *v.* Delhi Municipal Committee 84, 205

- Ram Nath Sahani *v.* Sm. Sukumari Sinha, 82, 514
 Ram Padarat *v.* Commissioner of Police, 536
 Ram Prasad *v.* State, 984
 Ram Prasad Narayan Sahi *v.* State of Bihar, 67, 71, 73, 129, 219, 972, 1115, 1157, 1158
 Ram Prasad Seth *v.* State of U. P., 1136
 Ram Prasad Shaw *v.* Chief Secy.; Government of W. B., 700
 Ram Pratap *v.* Dominion of India, 129, 203
 Ram Pratap Jai Dayal *v.* Dominion of India, 79
 Ram Rakh *v.* Mst. Gulab, 494
 Ram Singh *v.* State of Delhi, 288, 289, 305, 643, 654, 672, 711, 716, 717, 1039
 Ram Singh and Others *v.* The State of Delhi and Another, 48
 Ram Singh Narain Singh *v.* Union of India, 82, 658
 Ram Vallabh Nagar *v.* Public Service Commission, 264
 R. Anantha Narayanam *v.* General Manager, Southern Railway, 215, 994
 Randhira *v.* State, A I R 1954 M. B. 83, 585
 Ranganadban *v.* Madras Electric Tramway, 971, 981, 985
 Ranganath *v.* Babu Rao, 63
 Rangaswamy *v.* Industrial Tribunal, 533
 Rangoon Batatoung Co. *v.* The Collector Rangoon, 156
 Rani *v.* Khagendra, 1026
 Raning Rawat *v.* State of Saurashtra, 41
 Rani Raj Rajeswari Devi *v.* The State of U. P., 222
 Ranjit *v.* State, A. I. R. 1952 H. P. 81, 599, 600, 618
 Ranjit Lal *v.* State of U. P., 393
 Ranjit Singh and Another *v.* A. I. R. 1952 H. P. 81, 598
 Ransingh *v.* State of Delhi, 705, 706
 Ranvijai *v.* Forest Officer, 983
 Rao Bahadur Singh *v.* State of Vindhya Pradesh A. I. R. 1953 S. C. 394, 583
 Rao Manohar Singh *v.* State of Rajasthan 69, 222, 511, 857
 Rashid *v.* I. T. I. Commn, 979, 980, 998
 Rashid Ahmad *v.* Municipal Bennion, 970
 Rashid Ahmad *v.* Municipal Board, 310, 545, 951, 966, 992
 Rashid Ahmad *v.* Municipal Board, Kairana, 23, 29, 67, 953, 954, 990, 1013, 1139, 1142
 Rashid and Others *v.* I. T. I. C., 977
 Rasipuram Union Motor Service, Ltd. *v.* State of Madras, 536
 Ras Shiv Bahadur Singh and Another *v.* State of Vindhya Pradesh A. I. R. 1953 S. C. 394, 580
 Rast *v.* Van Denman, 111
 Ratan *v.* Adhari, 543, 983
 Ratan Chandra *v.* Adhar Biswas, 73, 292, 536, 988
 Ratan Gond *v.* The State of Bihar, 1149
 Ratan Roy *v.* State of Bihar, 75
 Ratan Lal *v.* D. M. Ganjam, 678
 Ratilal *v.* State of Bombay, 774, 784, 792, 794, 1174
 Ratilal Panachand Ghandhi *v.* State of Bombay, 69, 79, 777, 793, 800
 Ravi Pratap *v.* State of U. P., 978, 988
 Rawat *v.* Vindhya Pradesh Govt. and Another, 196
 Raymon Co. (India) Private Ltd. *v.* Waverly Jute Mills Co. Ltd., 1116
 Raymond *v.* Chicago Union Co., 111
 R. C. Gupta *v.* The State, 617
 R. Chatterjee *v.* Sub Area Commander, 1047
 Reade *v.* Krishna, 963
 Reagan *v.* Farmer's Loan and Trust Co., 521
 Reaves *v.* Ainsworth, 1036, 1043,
 Rebat Ranjan *v.* State of Bihar, 79, 900
 Reg *v.* Alexander Martin Sullivan, 317
 Reg *v.* Garbad Becher, 621
 Reg *v.* Smith, 1035
 Regina (John M' Eroy) *v.* Dublin Corporation, 498
 Registrar *v.* Ishwari Prasad, 978
 Reoti *v.* Emperor, A. I. R. 1933 All 461, 1933 A. L. J. 523: 592
 Revana Siddiah *v.* State of Mysore, 722
 Rev. Fr. Joseph *v.* State of Kerala, 1089
 Rex *v.* Almon, 374
 Rex *v.* Barron (1914) 2 K. B. 570: 589
 Rex *v.* Basudeva, 644, 649, 694, 710
 Rex *v.* Chester Licensing-J J Ex. P. Bennion 974
 Rex *v.* Dhyani Singh, 780
 Rex *v.* Green Hill, 963
 Rex *v.* Grey, 376
 Rex *v.* Halliday, 663, 1041
 Rex *v.* Inland Revenue Commissioners, 969
 Rex *v.* Itwari, 776
 Rex *v.* Jackson, 963
 Rex *v.* Legatt, 963
 Rex *v.* Plummur (1902) 2 K. B. 339: 588
 Rex *v.* Secretary of State for Home Affairs, 638
 Rex *v.* Sussex Justices *ex parte* Mc Carthy, 1010
 Rex *v.* Vender Comb and Abbot (1796) Leach C. C. 708: 599
 Reynolds *v.* United States, 766, 770
 Ribrik *v.* Mc Bride, 522
 Richards *v.* Washington Terminal Co., 899
 Richie *v.* Illinois, 520
 Riggins *v.* District Court, 122
 R. K. Choudhry *v.* Collector, 970
 R. Kuppasamy *v.* State of Madras, 216
 R. L. Aurora *v.* State of U. P. 474, 912, 1109
 R. M. D. C. *v.* Union of India, 526, 571
 R. M. Seshadri *v.* District Magistrate Tanjore, 74, 543, 567
 R. M. Seshadri *v.* Second Addl. I. T. Officer, 208, 1111
 R. N. Vallinayagam Pillai, Proprietor of Shanmugananda Touring Talkies *v.* State of Madras, 568
 Robertson *v.* Baldwin, 480, 754
 Robinson *v.* Minister of Town and Country Planning L. R., 1010, 1064
 Rogers *v.* Alabama, 187
 Rohtas Industries Ltd. *v.* Brijnandan Pandey and Others, 1031
 Romesh Chandra *v.* Principal, B. B. I. College, 810

Romesh Chandra Chaube *v.* Principal, Bipan Behari Intermediate College, Jhansi, 811
 Romesh Thappar *v.* The State of Madras, 27, 345, 363, 776, 990, 1139, 1143
 Ronn Feldt *v.* Phillips, 663
 Rooney *v.* North Dakota, (1905) 196 U. S. 319: 576, 580
 Roshan Lal *v.* State, 714
 Ross *v.* Oregon, (1913) 227 U. S. 150: 576, 580
 Rour Pratap *v.* State of U. P., 977
 R. Sankar *v.* State, 1113
 R. S. Seth Shanti Sarup *v.* Union of India, 62, 906
 Rucknbrod *v.* Mullims, 524
 Rulia Ram *v.* Sadhram, 511
 Rura Ram *v.* Gurbachna, 210, 243
 Rustom E. Mody Parsi *v.* State of Madhya Bharat, 207
 Rustom E. Mody Parsi *v.* State of M. B., 82, 811
 R. Vasu Nair and Others *v.* T. C. State, 425
 Ryots of Garabundho *v.* Zamindar of Parlakimedi, 961

S

Sadal and Others *v.* The State, 542, 568
 Sadasib Prakash Brahmachari Trustee of Mahiprakash Muth *v.* State of Orissa, 994
 Sadasivam *v.* State, 571
 Sadhu Ram *v.* Crown, 739, 741
 Sadhu Ram *v.* Custodian General of Evacuee Property, 862
 Safatulla *v.* Chief. Secy., 711
 Safatullah Khan *v.* Chief Secretary to Government of West Bengal, 728
 Safatullah Khan *v.* Chief Secretary, W. Bengal Government, 707, 708, 720
 Saff *v.* State of W. B., 829
 Saghir Ahmed *v.* State of U. P., 59, 539, 829, 837, 905, 913
 Sagir Ahmad *v.* Government of Uttar Pradesh, 904
 Sagir Ahmad and Others *v.* The Govt. of the State of Uttar Pradesh, 82, 139, 207
 Saia *v.* New York, 320, 327
 Saifuddin *v.* Tyebji, 779, 791
 Saik Mohidin *v.* Thakar Singh, 512
 Sailendra Nath Sinha *v.* The State, 612
 Saiyad Badasaheb Motimayan *v.* State of Saurashtra, 906
 Saka Venkata Rao *v.* The Union of India, 990
 S. A. Khader & Co. *v.* Subramania, 564
 Sakhawant Ali *v.* State of Orissa, 211, 535, Saksena *v.* State, 963
 Sales Tax Officer Pilibhit *v.* Messrs Budh Prakash Jai Prakash, 70
 Salig Ram *v.* Ram Prasad, 494
 Samarendra *v.* University of Calcutta, 970
 Sambandam *v.* General Manager, 975, 980, 984
 Samdasini *v.* Central Bank of India, 312, 336
 Samir Kumar *v.* Someswar Mukherjee, 78, 202, 571
 Sampuran Singh *v.* Competent Officer, 906
 Samsudin *v.* Asstt. Custodian, 80, 200, 489, 855

Samuel *v.* McCardy, 471
 Sandal *v.* State, 124
 Sandback Charity Trustees *v.* North Staffordshire Ry. Co., 156
 Sandhi *v.* Att. General, 969
 Sanfrancisco Shipping News Co. *v.* City of Sanfrancisco, 322
 Sangappe Mallappa Kolli *v.* State of Mysore, 726, 1134, 1135
 Sanghram Singh *v.* Election Tribunal, 1031
 Sanjit Kumar Chaudhry *v.* Principal, 786, 795, 813, 815, 816
 Sankarasana Ramanuja *v.* State of Orissa, 917, 939, 940
 Sankara Subramony *v.* State, 73, 565
 Santa Clara Co. *v.* Southern Pacific R. Co., 102, 120
 Santhamma *v.* Neelamma, 907, 910
 Santhamma *v.* State of Hyderabad, 707, 718, 720
 Santhana Krishna *v.* Vaithilinga, 898
 Santhana Krishna Adayar *v.* Vaithilingam and Others, 82
 Santhana Krishna Odayar *v.* Vaithilingam, 205, 514
 Santirriya *v.* Surendra Nath, 956, 983
 Santosh and Others *v.* R., 622
 Sant Singh *v.* State of J. & K., 941
 Saraswathi Ammal *v.* Dhanakoti Ammal, 963
 Sarathy *v.* State of Madras, 527
 Sardara *v.* Niwaz, A I R 1950 Lah. 40, 591
 Sardara Singh *v.* Custodian Muslim Evacuee Property, 75, 183
 Sardar Iqbal Singh *v.* Municipal Board, 1129
 Sarvadevabhatta *v.* State, 680
 Sarwalal *v.* State, 936
 Sardara *v.* State of Hyderabad, 929
 Sasamusa Sugar Works *v.* State, 980
 Sashi Bhushan *v.* Mangala, 80
 Sashi Bhushan Pati *v.* Mangala Biswal, 514, 900
 S. Asrar Ahmad *v.* State of Ajmer, 898
 Satiojholia *v.* Emperor, 739
 Satish Chand *v.* Delhi Improvement Trust, 1168
 Satischandra Anand *v.* Union of India, 129, 957
 Satrugna Sahu *v.* State of Orissa, 912
 Satya Banjan Roy *v.* Commr. of Police, Calcutta, 555
 Satya Kinkar *v.* Nikhil Chandra, 75
 Satyakurkar *v.* Nikhil Chandra, A I R 1951 Cal. 101, 609
 Satyanarayan Nathani *v.* State of W. Bengal, 911
 Sauer *v.* New York, 120, 636
 S. A. Venkat Raman *v.* Union of India, A I R 1954 S C 375, 597
 Savings and Loans Association *v.* Topeka, 6
 Sawzey *v.* Sauvery, 112
 Sayed Badasaheb Motimiyani *v.* State of Saurashtra, 937
 S. B. Trading Co. *v.* Shyam Lal, 75
 Schenck *v.* United States, 295, 324, 327, 363, 770
 Schiller Pian Co. *v.* Illinois Northern Utilities Co., 104

- Schneider v. Irrington, 323, 371, 421
 Scott v. McNeal, 120
 Scott v. Pilliner, 29
 S. C. Satya Narayan Nathani v. State of West Bengal, 925
 Sea Board Air Line Co. v. U. S., 886, 889
 Secretary of State v. Fahdunnissa, 98
 Secretary of State v. Mask, 98
 Secretary of State v. O. Brien, 631
 Segal Sem Indraman Singh v. State of Manipur, 347
 Sehneck v. U. S., 386
 Sekkilar v. Krishnamoorthy, 989
 Sekt v. Justices Court, 167 A L R 833 : 578
 Senai Ram v. I. T. Commr., 973
 Sendall v. Federal Commission, 12 C L R 664 : 577
 Senn v. Tile Layers Protective Union, 360
 Seshadri v. Dist. Magistrate, 1170
 Seshayya v. Narasimhacharlu, 243, 244
 Settler v. O' Hara, 520, 637
 Sevachand Boid v. Commr. of Income Tax, 1031
 S. G. Sardesai v. The Provincial Government, 709, 739
 S. Gurusan Singh v. Punjab State, 906
 Shabbir Husain v. The State of U. P., 66
 Shah Jethalal Lalchand v. Dubar Shri Amarwala Laxmanwala, 80, 200
 Shah Transport Co. v. State of Madhya Pradesh, 560, 987
 Shaik Kalesha v. State, 700
 Shaik Mansoor v. Tra. Co. Govt., 74
 Shaikla Bala Devi v. Chief Secretary of the Govt. of Bihar, 301
 Shama Bai v. State of U. P., 1047, 1112
 Shama Rao v. D. M. Thana, 713, 730, 731
 Shambhu Dayal v. Pepsu, 988
 Shamdasani v. Central Bank of India, 14, 900
 Sham Rao v. Pakruikar and Others, 71
 Sham Rao v. Parulckar, 699
 Shana v. Custodian of Evacuee Property, 485
 Shankar & Co. v. State of Madras, 372
 Shankari Prasad v. The Union of India, 1155
 Shankart Lal v. Addl. Dy. Commissioner, 829
 Shanker v. Emperor, A I R 1947 Pat 290, 594
 Shanker v. Returning Officer, 971
 Shanta Devi v. Custodian of E. P., 489, 505, 512, 582, 828, 829, 831
 Sharbe Khan v. Emperor, 10 C W N 518, 594
 Shark Mohd Hussain v. State, 1171
 Sharma v. Satish Chandra, 612
 Shashi Bhushan v. Mangala Biswal, 199
 Shazad Khan v. Jhallu Singh, 921
 Sheikh Mohammad Hussain v. State; 613
 Sheik Masoor v. Govt. of U. S. T. C., 71
 Sheo Bachan v. State of Bihar, 706
 Sheo Karan Singh v. Daulat Ram, 224
 Shecnandan v. State of Hyderabad, 83
 Sheonath v. State, 80, 497, 564
 Sheo Shankar v. M. P. State Government, 71, 76, 128, 129, 142, 164, 525, 983
 Sheperd v. People, 25 N Y 406, 577
 Sher Singh v. Ghansi Ram, 70, 222
 Shew Pujan v. Collector, 829
 Shibban Lal Saksena v. State of U. P., 672, 722
 Shila Banerjee v. B. C. Das Gupta, 223, 566
 Shirur Mutt v. Commissioner, 197, 495, 791, 974
 Shiv Dutt v. State of Hima, 289
 Shiva Nandan v. State of W. B., A I R 1954 Cal 60, 204, 602, 658
 Shiv Bahadur Singh v. State of V. P., 197
 Shiv Dass v. The State, 1008
 Shiw Prasad v. State, 708
 Shiw Prasad Ram Narayan Joshi v. State, 708
 Shrawan Kumar Gupta v. Supdt. District Jail, Madura, 692
 Shree Ambarnath Mills Corporation v. D. B. Godbolc, 925
 Shree Kant Pandurang v. Emperor, 739
 (The) Shree Meenakshi Mills Ltd., Mathurai v. The State of Madras, 38
 Shri Durgaji v. State of Bihar, 79, 855, 902
 Shri Harish Chand v. Collector of Amritsar, 1111
 Shri Kisan v. Datta, 15, 80
 Shri Kishan v. State of Rajasthan, 1156
 Shri Krishna Sarma v. State of W. B., 722
 Shri Mali Lal Kasliwal v. Advocate General, 213
 Shrimati Prabhavati Devi v. District Magistrate, Allahabad, 498
 Shri Ram, v. Shri Ram, A I R 1952 All 642 : 599
 Shri Ram Ghli and others v. Shri Ram Kishun Das, (1951) 6 D L R All 231, 598
 Shudarshan Lal Triwedi v. Dean of Faculty of Science, University of Allahabad, 989
 Shyamal v. Municipal Board, 196, 218
 Shyam Krishan v. State of Punjab, 67, 871, 875, 894, 907
 Shyamlal Jognani v. State, A I R 1954 Pat 247, 602
 Sihnu v. Lachman Das, 543
 Sikarchand v. Bank of Baghel Khand, 75, 196
 Sikhar Chand v. Bank of Baghelkhand, 854
 Sim v. Stretch, 315
 Singh Nathawn v. State of Punjab, 721
 Sioux City Bridge Co. v. Dakota County Nebraska, 123
 Siremal and Others v. Kantilal, 488
 Siser Kumar v. Majumdar, 980
 Sitao Jhola v. Emperor, 640
 Sita Prasad v. State of Orissa, 75
 Sita Ram Kishore Puria v. State of Bihar, 723
 Sitha Ramachary v. The Senior Dy. Inspector of Schools Cronanavaram Range, 425
 Siva Jay Teong v. Bounlay, 964
 S. K. Dutt v. A I Jute Mills, 979
 S. K. Ghose v. Vice Chancellor, 974, 972
 Skinner v. Oklahamma, 26, 121
 Sm. Anjali Roy v. State of West Bengal, 258
 Sm. Chhaya Devi v. State of Bihar, 875, 914
 Sm. Ram Katori v. Rent Controller and Eviction Officer, Agra, 77, 500
 Sm. Saw Indumati v. State of Saurashtra, 930
 Smihj v. Alwright, 240

- Sm. Anjali Roy *v.* State of West Bengal, 258
 Smt. Bimla Devi *v.* Chaturvedi, 76, 569
 Smyth *v.* German Alliance Insurance Co. *v.* Lewis, 521
 S. M. Zaki *v.* State of Bihar, 79, 512
 S. Narayana Pillai, *v.* State of T. C., 1095
 Smt. Clara *v.* S. Pacific R. R. Co., 99
 S. N. Banerje and Another *v.* Kuchwar Lime and Stone Co., 380
 Snowden *v.* Hughes, 104, 112, 205
 (Messrs.) S. N. Transport, Co. *v.* State Transport Authority, 1001
 Sohan Lal *v.* Union of India, 1000
 Sohan Singh *v.* The State, 711
 Sohi Sumsher Singh and Another *v.* State of Pepsu, 993
 Sorab Sauaksha *v.* Emperor, 408
 Sornalingam Chettiar *v.* Asst. Commr. of Labour, Karaikudi, 613, 1171
 Soundar Rajan & Co. *v.* State of Madras, 216
 Southern Express Co. *v.* Whittle, 460, 461,
 South Holland *v.* Stein, 325
 South India Bank Ltd. Tirunel Veli *v.* T. D. Pichuthayappan, 77, 83, 201, 206
 Sov. Frachl *v.* Van Vadens, 693
 S. P. Jaiswal *v.* The State and Another, 657
 Spraigne *v.* Thompson, 27
 Spring Field Gas and E. Co. *v.* Spring Field, 524
 Spring Valley Water Works *v.* Schottler, 522
 S. Raghbir Singh *v.* Union of India, 210, 493, 861
 Sreelal Modi *v.* Executive. Officer, A I R 1955 N U C (Orr) 2140 : 586
 Sree Meenakshi Mills *v.* State of Madras, 75
 Sri Jagannath Ramanuja Das *v.* State of Orissa 782, 794, 801, 1168
 Sri Kisan *v.* Dattu, 128, 129
 Srinivas *v.* Mahabir, 1026
 Srinivas *v.* State of Madras, 99, 119, 347, 985
 Srinivasa *v.* Madras, 64, 369
 Srinivasa Iyer *v.* Saraswathi Ammal, 39, 73, 196, 774, 775, 779
 Srinivas Kedwal *v.* State of West Bengal, 904, 925
 Sri Niwas Kedwal *v.* State of West Bengal, 83
 Sri Raj Narain Singh *v.* Dist. Magistrate Gorakhpur, 408
 Sri Ram *v.* Notified Area Committee Khatauli, 24
 Sri Ram Jhabarmul *v.* S. C. Das Gupta, 208
 Sri Ram Ram Narain *v.* State of Bombay, 942, 946
 S. Salehuddin *v.* State of Andhra Pradesh, 724, 725, 1135
 S. Sankara Subramany *v.* State and Another, 559
 S. Sant Singh *v.* State of Jammu and Kashmir, 946
 S. S. Yussuf *v.* Rex 707
 Standard Oil Co. *v.* United States, 413
 (The) State *v.* Baboolal, 370, 390
 State *v.* Banwari, 74, 757
 State *v.* Damodar Ganesh Mahajan, 437
 State *v.* Deadley Misra, 391
 State *v.* E. and P. E. T. and P., 380
 (The) State *v.* Editor, Printer etc. of Mathru Bhumi, 382
 State *v.* Gulab Singh, 1047
 State *v.* Gulab Singh and Others, 76
 State *v.* Haidar Ali, 494
 State *v.* Hari Prasad Fethlal, 66
 State *v.* Hari Prasad Jethal, 348
 State *v.* Harlow, 371
 State *v.* Henry, 124
 State *v.* Hyder Ali, A I R 1955 Hyd. 128,
 Vide A I R 1953 S C 394 Relied upon, 586
 (The) State *v.* Jarawar, 755
 State *v.* Kckee, 371
 State *v.* Keshev Menon, 64
 State *v.* Kishan, 270, 1047
 State *v.* Maganlal, 409, 703
 State *v.* Mahajani, 360
 State *v.* Malle Berger, 128 A L J 1506 : 577
 State *v.* Mangala, 393
 State *v.* Masoon, 300
 State *v.* Mc Cook, 867
 State *v.* Montgomery, 123
 State *v.* Moti Lal, 66
 State *v.* Muktar Singh, 1025
 State *v.* Narasa Appamall, 71
 State *v.* Narayanan, A I R 1954 M B 206, 285
 State *v.* Padmakant Malviya, 613
 States *v.* Percheman, 1102
 State *v.* Philpote Philip, 70
 (The) State *v.* Prakash Singh, 659
 State *v.* Radhgovinda Das, 376
 State *v.* Ramchandra Sharma, 1123
 State *v.* Ramkumar Ramgopal, 615
 State *v.* Richcreek, 122
 State *v.* Samnath, 967
 State *v.* Sheikh Hussain, 64
 State *v.* Thompson, 371
 (The) State *v.* Veereshwar Rao, A I R 1955 N U C (M B) 3037 : 602
 State *v.* Venkata Durga, 217
 State *v.* Vithal, 234
 State Board of Equalization of California *v.* Young's Market Co., 122
 State Government M. P. *v.* Amrit Lal Aman Lal, 80
 State of Bihar *v.* Deodar Jha, 396
 State of Bihar *v.* D. N. Ganguly, 1006
 State of Bihar *v.* Kameshwar Singh, 27, 69, 73, 823, 828, 856, 870, 876, 1052, 1070, 1076
 State of Bihar *v.* Maharaja Dhiraja Sir Kameshwar Singh, 887
 State of Bihar *v.* Ram Naresh Pandey, 1032
 State of Bihar *v.* Shailabala Devi, 72
 State of Bom. *v.* M. P., 1123
 State of Bombay *v.* Atma Ram, 654, 669, 672, 680, 693, 702, 728
 State of Bombay *v.* Atma Ram Shridhar Vaidya, 675
 State of Bombay *v.* Balasara, 195, 303, 493, 1156, 1163
 State of Bombay *v.* Bhanji Munji, 486
 State of Bombay *v.* Bombay Education Society, 816
 State of Bombay *v.* Bombay Education Society and Others 812

- State of Bombay *v.* F. N. Balsara, 29, 58, 65, 166, 373, 510, 1070, 1115, 1156, 1159
- State of Bombay *v.* Heman Santal, 33, 74, 75, 438, 875, 922, 923, 924
- State of Bombay *v.* Lakshmidas, 956, 971
- State of Bombay *v.* Mohan Lal, 884
- State of Bombay *v.* Narasuappa, 30, 48, 60, 73, 245, 774, 775, 781
- State of Bombay *v.* R. M. D. Chamar Baugwala, 293, 528, 550
- State of Bombay *v.* United Motors, 70, 197, 1013
- State of Georgia *v.* City of Chatlanooga, 324
- State of Kerala *v.* Joseph, 549
- State of Kerala *v.* P. Krishnan, 659
- State of Madh. Prad. *v.* Veeraswar Rao, A I R 1957 S C 592, 1957 S C J 519 : 603.
- State of Madras *v.* Champakam Durai Rajan, 218, 233, 808, 810, 1056, 1069
- State of Madras *v.* C. P. Agencies, 1026
- State of Madras *v.* K. H. Chambers, 212
- State of Madras *v.* Smt. Champakam Dorai Rajan, 32, 150, 1150
- State of Madras *v.* Venkata Durga Prasad Rao, 215
- State of Madras *v.* V. G. Row, 291, 292, 303, 1163, 1165
- State of Manipur *v.* Sarangthem, 1025
- State of Missouri *v.* Holland, 1101
- State of M. P. *v.* G. C. Mandawar, 70
- (The) State of M. P. *v.* Mother Superior Convent School, 789
- State of Mysore *v.* H. L. Chabiani, 1026
- State of Orissa *v.* Bharat Gandra Nayak, 930
- State of Orissa *v.* Madan Gopal, 957, 1025
- State of Punjab *v.* Ajaib Singh, 129, 643, 655, 680, 686, 690, 691, 968, 1172, 1173,
- (The) State of Punjab *v.* Ajaib Singh and Another, 76, 197
- State of Punjab *v.* S. Kehar Singh, 941
- State of Rajasthan *v.* Nathmal, 904, 909
- State of Rajasthan *v.* Nath Mal and Another, 69
- State of Rajasthan *v.* Rao Manohar Singhji, 61, 219
- State of U. P. *v.* Man Bodhan Lal Srivastava, 997, 1002
- (The) State of U. P. *v.* Mohammad Nooh, 1005
- State of U. P. *v.* Shiva Bahadur Singh, 75
- State of Vindhya Pradesh *v.* Shiva Bahadur Singh, A I R 1951 V P 17, 584
- State of W. B. *v.* Bella Banerjee, 908
- State of W. B. *v.* Lakshmi Narayan Singh, 862
- State of West Bengal *v.* Anwar Ali, 41, 65, 131, 185, 218, 292, 654, 1107, 1115, 1156, 1157, 1158, 1159
- State of West Bengal *v.* Mrs. Bella Banerjee, 81, 903, 926, 929
- State of West Bengal *v.* Subodh Gopal Bose, 81, 859, 863, 871, 913, 914, 924
- State Prosecutor *v.* Malayappa and Others, A I R 1955 N U G (Mad)—A I R 1955 Mad 161, 602
- S. T. Co., *v.* State of M. P., 543
- Stebbins *v.* Riley, 123
- St. German *v.* Bakery & Confectionary Workers Union, 360
- Stones *v.* Farmers Loan and Trust Co., 537
- Strickley *v.* Highland Gold Mining Co., 867
- Stromberg *v.* California, 324
- Subad Gopal *v.* Behari Lal, 65, 290, 487
- Subbarao *v.* Venkatta Chhelapathy Ayyar, 618
- Subbaya Goundan *v.* Bhoopala Subramanian, 616
- Subbusamy *v.* Kamakshi, 963
- Subedar *v.* State, 614
- Subeg Singh *v.* Emperor, A I R 1942 Lah 84, 595
- Subharao *v.* Veeraraju, 1026
- Subodh *v.* State, 678
- Subramanya *v.* Revenue Divisional Officer, 980
- Sudhindra *v.* Sailendra, 73, 476, 484, 922
- Sudhindra Nath Datta *v.* Sailendra Nath Mitra, 895, 929
- Sudhindra Thirtha Swamier *v.* Commissioner of H. R. and C. Endowments, 795, 800
- Sudhir *v.* The King, 1024
- Sukhdev Singh *v.* Hon'ble Judges of the Pepsu High Court, 382
- Sukhnandan Thakur *v.* State of Bihar, 264, 1001, 1068
- Sukhtam Das *v.* President Bihar State Board of Religious Trust, 83, 784
- Sultan *v.* Emperor, 621
- Sultan Salchuddin *v.* The State of Andhra Pradesh etc., 1134
- Sundaram Chetti *v.* The Queen, 406
- Sundarlal Bajinath Jaiswal *v.* State of M. B., 213
- Sunday Lake Iron Co. *v.* Wake Field Township, 123, 186, 187
- Sunder *v.* Emperor, 685
- Sunder Singh *v.* The State, 612
- Sunil Kumar *v.* West Bengal, 67, 741
- Sunni Central Wakf Board *v.* Intizar Hussain, 1006
- (The) Sunni Central Waqf Board U. P. etc. *v.* Intizar Husain and Others, 1148
- Sunshine Anthracite Coal Co. *v.* Adkin, 537
- Sunshine Coal Co. *v.* Atkins, 520
- Superintendent and Remembrancer of Legal Affairs, State of West Bengal *v.* Rabnawaz Khan, 437
- Suraj Kumari *v.* Dr. Chatani, 70
- Surajmal *v.* Rajasthan State, C. M. 856, 900
- Suraj Mall Mehta and Co. *v.* A. V. Visvanatha Sastri and Another, 219
- Suraj Mull *v.* Asst. Collector of Customs, 976
- Suref Konda-Reddi *v.* Emperor, A I R 1951 Mad 17, 609
- Surendra *v.* Gopal, 981
- Surendranath Jana *v.* State of West Bengal, 911, 940
- Suresh *v.* Himangshu, (1951) 55 G W N 605 A I R 1953 Cal 316, 600
- Suresh Chandra *v.* Himangshu Kumar Roy, 70 (Dr.) Suresh Chandra *v.* Punit Goala, 75
- (Dr) Surju Prasad Gumasta *v.* State of M. P., 1007
- Suryanarayana *v.* Vijay Commercial Bank, 616, 617
- Surya Pal *v.* State of U. P., 870

Surya Pal Singh *v.* Government of the State of U. P., 73
 Surya Pal Singh *v.* U. P. Gopal, 289
 Surya Pal Singh *v.* U. P. Govt., 50, 129, 153, 417, 423, 775, 782, 791, 884, 889, 890, 917, 918, 931, 1070,
 Sushil Bhushan *v.* Mangla, 1085
 Sushil *v.* Government of Bengal, 669
 Sushila *v.* Commissioner of Police, 707, 719
 S. Visvanathan *v.* East India Distilleries and Sugar Factories Ltd., 481
 Swami Hariharan and Saraswathy *v.* Jailor, Dist. Jail Banaras, 673
 Swami Harihar Nand Saraswathy *v.* The Jailor I. C. District Jail Banaras, 784
 Swarnalingam Chettiar *v.* Asst. Labour Inspector, 613
 Swartz *v.* Edrington, 325
 Swarup *v.* State, 615
 Sweat *v.* Painter, 26, 242
 Sweet *v.* Rechel, 867, 907
 Swift and Co. *v.* New Port, 111
 Syamal Mandal *v.* Municipal Board of Dhubri, 151
 Syed Mohammad *v.* State of Bihar, 544
 Syed Mohammad Rajvi *v.* State of Hyderabad, 71, 197
 Syedna Taher Saifuddin *v.* Tyebbhahi Moosaji Koicha, 79
 Syedna Tahr Saifuddin *v.* Tyebbhahi Moosaji Koicha, 782
 Syed Quasim Razvi and others *v.* State of Hyderabad, 76
 Syme *v.* Commonwealth, 877

T

Tahera Begum *v.* State of Hyderabad, 67, 68, 221
 Tara Gharan Mukherjee *v.* B. C. Das Gupta, 84, 555
 Tarapada *v.* State of West Bengal, 676, 680, 706, 707, 712, 719, 968,
 Tarapada De and Others *v.* State of W. Bengal, 699
 Tara Singh *v.* The State, 311, 369, 369
 Tazamal *v.* Govt. of West Bengal, 67
 T. Balakrishnan *v.* State of Madras, 221
 T. B. Ibrahim *v.* Regional Transport Authority, 76, 532, 542
 T. E. C. *v.* Howe, 235
 Teja Singh *v.* The State, 699, 730
 Tej Behdur Singh *v.* State, 208
 Tejraj Chhoganlal Gandhi *v.* State of M. B. 788, 1002
 Ten Bug Tain *v.* Collector of Bombay, 875
 Terminal Taxicab *v.* Kutz, 480
 Terrace *v.* Thompson, 123, 124, 471.
 Thacker Valji Korji *v.* Collector of Kutch, 861
 Thakur Amar Singh *v.* State of Rajasthan, 213
 Thakur Bhim Singh *v.* State, 723, 724
 Thambiran *v.* State of Madras, 884
 Thamsi Goundan *v.* Kanni Ammal, 203
 Thangal Kunju Mudaliar *v.* M. Venkata Chalam Poli, 226
 Thangavelu Chettiar *v.* Commr. of Police, 555

The Karnal Kaithal Cooperative Transport Society Ltd. *v.* The State of Punjab, 1006
 The Maheshwari Devi Jute Mills Ltd., Kanpur *v.* Lahore Appellate Tribunal, 76, 615
 The Peoples Bus Services Ltd. *v.* State of Pepsu, 163, 563, 1076
 Thiruvudhinadha *v.* District Magistrate, 720
 Thomas *v.* Collins, 327
 Thomas *v.* Sawkins, 462
 Thomas Dana *v.* State of Punjab, 1132
 Thompson *v.* Kentucky, 636
 Thompson *v.* Missouri, 171 U. S. 380 (1898) 575, 576, 577
 Thompson *v.* Utah (1898) 170 U. S. 343, 577, 580
 Thompson *v.* Kentucky, 120
 Thorn Hill *v.* Alabama, 324
 Thulasi Das. Manoji *v.* Allepy Chamber of Commerce, 988
 Tiaco *v.* Forbes, 1038
 Tigner *v.* Texas, 188
 Tikaramji *v.* State of U. P., 545
 Tilak Ram Wadhwa Mal *v.* State of Punjab, 906
 Tilok Chand Gopal Das *v.* State, 84
 Tilokdhari *v.* Kesho, 1026
 Tilonho *v.* Attorney General of Natal, 1040
 T. K. Gopala Chetty *v.* Director of Public Insurance, Mysore, 494
 T. Nagappa *v.* T. C. Basappa, 1030
 Toomu *v.* Civil Administrator, 83, 205, 1024
 Transport Development Co., Chhatarpur *v.* Nowgong Bus Association, 563
 Traux *v.* Corrigan, 121
 Traux *v.* Raich, 104, 1111
 Trenton *v.* New Jersey, 124
 Tribunal *v.* Ventata, 985
 Trilok Chand *v.* The State, A I R 1954, Ajmere-19 : 602
 Trilokchand Gopal Das *v.* State, 335, 391
 Trimbak *v.* The State, 75
 Trinity Methodist Church South *v.* Federal Radio Commission, 325
 Trojan & Co. *v.* Nagappa, 1026
 Trono *v.* U. S., 199 U. S. 521 : 588
 Tropical Insurance Co. Ltd. *v.* United India, 994
 (The) Trustees of Dartmouth College *v.* Wood Ward, 8, 637
 T. Schenk *v.* U. S., 18
 Tumey *v.* Ohio, 120, 635, 636
 Tyson Bro. *v.* Banton, 479, 521, 537,

U

Ujagar Singh *v.* State of Punjab, 707, 716, 727, 732
 Ujjar Singh *v.* Punjab, 1173
 Ujjer Singh *v.* State of Punjab, 675 703,
 Umar Singh *v.* State of Rajasthan, 939
 Umed Sing *v.* State, 697
 Umed Singh *v.* State of Bombay, 937, 939
 Umrao Mal *v.* State of Rajasthan, 659
 Union Colliery Co. *v.* Brejden, 649
 Union of India *v.* Elbridge, 969
 Union of India *v.* T. R. Varma, 1002
 Union of Workmen *v.* R. S. N. Co., 977
 United Mine Workers of America *v.* Coronada Coal Co., 411

- United Motors (India) Ltd., *v.* State of Bombay, 982, 992
 United State *v.* Caltex, 825
 United States *v.* Causeby, 878, 888, 899
 United States *v.* Commodities Trading Corporation, 895
 United States *v.* Hess, 317 U. S. 537, 588
 United States *v.* Hoxie, 345
 United States *v.* Josef, (1824) 9 Wheaton, 579; 587
 United States *v.* Kansas City Life Insurances Co., 899
 United States *v.* Lanza, 260 U.S. 377, 382; 587
 United States *v.* Lipsell, 1037
 United States *v.* Macintosh, 363
 United States *v.* Marigold, 9 How., 560 : 586
 United States *v.* Miller, 400, 888
 United States *v.* Ohio Oil Co., 480
 United States *v.* Perez, 9 Wheat 879 : 588
 United States *v.* Robinowich, 238 U.S. 78, 587
 United States *v.* Vigol, 345
 University of Madras *v.* Shanta Bai, 23, 811, 1174
 U. P. Bank *v.* Secy. U. P., 1030
 Upendra Chandra Dey *v.* State A. I. R. 1954 Assam, 106: 601
 U. S. *v.* Ballard, 770
 U. S. *v.* Butler, 1062
 U. S. *v.* Butler and Schecter Poultry, 1062
 U. S. *v.* Carolene Products Co., 645
 U. S. *v.* Cohen Grocery, 634
 U. S. *v.* Darby Lumber Co., 759
 U. S. *v.* Dennis, 329
 U. S. *v.* Derby, 1063
 U. S. *v.* Gettysburg Ry., 866
 U. S. *v.* Great Falls Mfg. Co., 866
 U. S. *v.* Miller, 867
 U. S. *v.* Pridgeon, 1043
 U. S. *v.* Sausby, 866
 U. S. *v.* White (1944), 322 U. S. 694 : 606
 Usman *v.* Labour Appellate Tribunal, 976
 Utah Power and Light Co. *v.* United States, 461
 Uttam Singh *v.* Kartar Singh, 84
 Uveges *v.* Pennsylvania, 662
- V**
- Valley Water Works *v.* Schottler, 480
 Vallinayagam *v.* State of Madras, 72, 544
 Vandy *v.* Adams, 693
 Varadachari *v.* State, 546
 Varadachari *v.* State of Madras, 549
 Varadarajaswami Temple Etc. *v.* Sri Kushnappa Govinda and Others, 1149
 Vared Vared *v.* The State, 83, 206
 Vasude *v.* Vamanji, 778
 Ved Prakash *v.* I. T. Commr., 1000
 Veerappa *v.* Raman, 973, 976
 Veerappa Chettiar *v.* State of Madras, 927
 Veerappa Pillai *v.* Raman and Raman Ltd., 954, 997
 Veeraswara Swamyavara Etc. *v.* Board of Commissioners Hindu Religious Endowments Madras, 495, 504
 Veernath *v.* Hyderabad, 907
 Veernath *v.* State of Hyderabad, 910
 Velusami *v.* Raja Nainar, 1007
 Venkatachala Naicker *v.* Punchayat Board, 1077
 Venkatadri *v.* Tenali Municipality, 215
 Venkatanarasayya *v.* State of Madras, 863, 911, 983
 Venkataraman *v.* State of Madras, 218
 Venkata Reddi *v.* Emperor, 623
 Venkata Subbayya *v.* Md. Falauddin Khaji, 406
 Venkatmanasa, Reddy *v.* State, 47, 65
 Venkatraman *v.* Commissioner of Police, Madras, 67, 582, 657
 (Sri) Venkatramana Devaru *v.* State of Mysore, 787, 795, 1033
 Ventateswara *v.* Shekari, 1026
 Venugopalal *v.* Vijayawada Municipality, 1001
 V. G. Deshpandey *v.* City Magistrate Lucknow, 389
 V. G. Row *v.* State of Madras, 64, 84, 204, 368, 417
 Vibhuti Narain Singh *v.* Improvement Trust, Banaras, 82
 Vice Chancellor and Others *v.* S. K. Ghose and Others, 998
 Victor Emanuel Pereira *v.* U. S. A., A. I. R., 1955 N. U. S. 5270=98 L. Edn., 329 : 588
 Victoria *v.* Commonwealth, 59
 Vidya Purna Thirthaswami *v.* Vidhyanidhi Thirthaswamy, 781
 Vikaruddin *v.* Osmania University, 204, 812
 Village of Euclid *v.* Amber Co., 482
 Village of Euclid *v.* Ambler Realty Co., 26, 299
 Vimalabai *v.* Emperor, 651
 Vimal Kishore Mehrotra *v.* State of Uttar Pradesh, 688
 Vinal Chemical and Pharmaceutical Works *v.* State of Madhya Pradesh, 537
 Virendra *v.* State of Punjab, 527, 528, 1169
 Virendra and Narendra *v.* State of Punjab, 393
 Virendra, Editor, Daily Pratap, *v.* Punjab State, 392
 Virendra Singh *v.* State of Uttar Pradesh, 857, 993
 Vishnu Krishnan Namboodin *v.* P. N. Kripal, 265
 Vishnu Vishan Bhattiathiripad *v.* Poulo Poulo, 200
 (Shri) Vishwothama Thirtha Swamiar of Soda Mutt, Udipi *v.* State of Madras, 270, 785
 Visvanathan *v.* District Judge of Bangalore Petn, 25
 Visveshwar Row *v.* State of Madhya Pradesh, 73, 891, 916, 944
 Vithal Rao *v.* Madhu, 513
 V. M. Syed. Mohammad *v.* State of Andhra, 216
 V. M. Syed Mohammad and Company *v.* State of Andhra, 69, 77, 198, 201, 1115
 V. S. K. Adhi Chettiar *v.* State of Madras, 142
 V. Srinivasan *v.* Padmasini Ammal, 258
- W**
- Wachoo *v.* Collector, 974
 Wade *v.* Hunter (1949) 338 U. S. 684: 588
 Wallace *v.* Pfost, 123

Walls v. Midland Carbon Co., 289
Walston v. Nevin, 99
Warden v. Baibey, 1034, 1036
Ware v. Hyloon, 1101
Wason v. Walter, 385
Wasudeo Anant v. Emperor, 963
Waterside Workers' Federation v. Commonwealth Steamship Owners' Association, 27
Watson v. Maryland, 299
Wazir Chand v. State of Himachal Pradesh, 857, 973, 983, 987
W. B. S. K. Co-operative Cr. Society v. Mrs. Bella Bancrjee, 72, 490, 491, 883, 889, 896, 908
Weeks v. United States, (1914) 232 U. S. 383, 607
Wellcsley v. Beau Fort, 374
Weymes v. Hopkins, (1875) L. R. 10 Q. B. 378: 588, 589
Wemys v. Hopkins, 10, Q. B. 378, 590
West Bengal v. Anwar Ali, 66, 139
West Bengal Coop. Societies v. Bella, 870, 925, 926
West Coast Hital v. Parish, 103, 1062
Western India Theatres v. Cantonment Board, 1117
West Rand Gold Mining Co., v. Rex, 1100, 1101
West River Bridge Co., v. Dix, 471
West Virginia State Board of Education v. Barnette, 766, 768
Whiswanath v. 2nd. Addl. Dt. Judge, 971, 973
Whitney v. California, 329, 388

Wilkes v. Wood, 630
William Adams v. State of Maryland, (1954) 98 Law Edn, 608: 607
Williams v. Scotland Oil Co., 520, 521, 523
Wilson v. United States, 149, U. S. 60: 606, 613
Wimona Co. v. Minnesota, 99
Winston v. State, 118 A. L. R. 719: 577
Winter v. Barrett, 124
Winters v. New York, 328
Wolff Packing Co. v. Court of Industrial Relations, 309, 521, 525
Wright v. Fitz Gerald, 1041, 1045
Wright v. May, 123
Wrubleski v. McInerney (1948) C. A. 9th Cal 166 F: 589
W. T. Price v. Illinois, 164

Y

Yasin v. Town Area Committee, 974, 982
Yick Wo v. Hopkins, 104, 111, 1111
Young v. Adams, (1898) A. C. 469: 577, 826
Youssopeff v. M. G. M. Pictures, 315, 383
Yusofulla v. King, (1951) 6 D. L. R. 18 P. C., 591
Yusuf v. Rex, 696
Yusuf Abdul Aziz v. State, 74, 196, 231, 235

Z

Zaheer and Another v. State and Others, 208
Zamindar of Ettiyapuram v. State of Madras, 81
Zamir v. Emperor, 696

The first part of the history of the world is the history of the human race. It is a history of the progress of the human mind, of the growth of the human soul, of the development of the human spirit. It is a history of the human race, of the human mind, of the human soul, of the human spirit. It is a history of the human race, of the human mind, of the human soul, of the human spirit.

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SUPPLEMENT

to

Fundamental Rights and Constitutional Remedies Vol. II

Article 20. Protection in respect of conviction for offence

Clause (1) Expost facto Law.

1. All that has to be considered is whether the *Expost facto law* imposes a penalty greater than that which might be inflicted under the law in force at the time of the commission of the offence. In this view though the Penal Code provides an unlimited fine (S. 420), Section 10 of the Ordinance XXIX of 1943 fixing minimum sentence of fine can not be said to contravene Art. 20.¹

2. The clause does not apply to continuing offences.²

3. The Supreme Court has pointed out³ that the expression 'Law in force' is used in both parts of Art. 20 (1) and this indicates that even if a criminal law is enacted by any legislatures retrospectively, its retrospective operation will be controlled by Art. 20 (1). A law in force at the time actually postulates actual factual existence of the law at the relevant time and this excludes the operation of any subsequent law.³

Art. 31 (1) on the other hand does not use the above expression but merely says 'by authority of law' and so if a subsequent law passed by the Legislature is retrospective in its operation it would satisfy the requirements of Art. 31 (1) and would validate the notification issued under the prior Act.³

4. Section 26 (5) of the Rajasthan Sales Tax Act 1954, as it originally stood, required that the date on which the Rajasthan Sales Tax Rules were to come into force must be notified. There was no such notification issued after the Act had come into force till the Rajasthan Sales Tax Rules Validating Act 1959 brought the Rules in force from 1-4-1955. The retrospective legislation for the purpose of the imposition of the tax was held permissible.⁴ But for the purpose of S. 16 of the Rajasthan Sales Tax Act the Rajasthan Sales Tax Rules 1955 cannot be given retrospective operation as that will be *post facto* legislation.⁴

5. Section 5 (3) of the Prevention of Corruption Act (1947) was held *intra vires* of Art. 20 (1). The Court disagreed with the view that consideration of the pecuniary resources or property in possession of the accused or any other person in his behalf which were acquired before the date of the Act was to be construed as giving the Act a retrospective operation. A presumption raised under S. 5 (3) in respect of pecuniary resources or property acquired before the Prevention of Corruption Act cannot be a breach of the right vouchsafed under Art. 20 (1). The sub-section merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct by a public servant, as defined in S. 5 (1) for which an accused person is already under trial.⁵

1. *Satwant Singh v. State of Punjab*, A I R 1960 S C 266 : (1960) 2 S C R 89.

2. *Aknarbai Nazarali v. Husain Bhai*, A I R 1961 Madh Pra 37.

3. *M/s West Ramnad Electric Distribution Co. Ltd. v. The State of Madras and another*, A I R 1962 S C 1753.

4. *Tulsi Ram Panna Lal v. State of Rajasthan*, I L R (1961) 11 Raj 445 : 1961 Raj L W 363.

5. *Sajjan Singh v. State of Punjab*, A I R 1964 S C 464.

Clause (2). Double Jeopardy.

1. Levy of penalty under the Andhra Pradesh Sales Tax Act for default in payment of Sales Tax is not a prosecution within the meaning of Art. 20 (2). Hence the provision for the levy of the penalty under S. 16 (3) and the starting of the prosecution under S. 30 (1) and S. 30 (3) of the said Act is not violative of Article 20 (2).¹

2. If in the previous case the contravention was of a provision imposing a different obligation and relates to a different period, no bar of *autrefois acquit* arises.² Further the prosecution and punishment must be in the nature of criminal proceedings before a Court of Law or Judicial Tribunal. It is not enough if it is a Tribunal entertaining a departmental or administrative enquiry though set up by a statute, when it is not required by law to try the matter judicially and on legal evidence.³

3. Enhancement of punishment in exercise of revisional jurisdiction departmentally is not a second punishment attracting the Article 20 (2).⁴ Nor is an acquittal a bar to a second prosecution since the prohibition in Art. 20 (2) is in respect of a prosecution and punishment more than once for the same offence.⁵ The principle of *autrefois convict* or of double jeopardy alone is accepted by the Constitution and not the plea of *autrefois acquit*.⁶

4. The Sea Customs Authorities are not a Judicial Tribunal. So their order of confiscation or penalty is no bar to prosecution and punishment under S. 167 (81) Sea Custom Act.⁷

5. The Rule as to Double Jeopardy applies only when both complaints refer to the same offence. So a complaint under S. 409 I. P. C. and that under S. 105 Insurance Act are not the same. There is no bar to such two trials under Art. 20 (2) or S. 26. General Clauses Act.⁸

6. Forfeiture provided in S. 13 (3) Criminal Law Amendment Ordinance (XXXVIII of 1944) in cases of offences which involve embezzlement etc., of Government money or property is not punishment or penalty within the meaning of Art. 20 (1). It is only a speedier method of realising Government money or property as compared to a suit by the Government.⁹ Forfeiture under S. 13 (3) by the District Judge cannot be equated to forfeiture of property which is provided in S. 53 I. P. C.⁹

Clause (3). Protection against Self-incrimination.

1. In *Mohammed Dastgir's*¹ case it was posited that for Article 20 (3) to come into play two facts have first to be established : (i) that the individual concerned was a person accused of an offence, and (ii) that he was compelled

1. *M. Seth Ramasamy & Co. v. C. T. O.*, A I R 1960 Andh Pra 451.

2. *State v. Dhanraj Mills Ltd.*, A I R 1960 Bom 453.

3. *D. A. Kelshikar v. State of Bombay*, A I R 1960 Bom 225 follows A I R 1954 S C 375.

4. *Ibid.*

5. *Madhujit Dev Barma v. Union Territory of Tripura*, A I R 1959 Tripura 51.

6. *Thingujam Tara Singh v. Puyam Gulap Singh*, 1961 (2) Cr L J 507.

7. *Boota Singh Mota Singh v. State*, A I R 1961 Punj 21 follows A I R 1959 S C 375, A I R 1953 S C 325 Distinguishes A I R 1953 S C 845.

8. *State of Bombay v. S. L. Apte*, A I R 1961 S C 578 : 63 Bom L R 491.

9. *State of W. B. v. S. K. Ghosh*, A I R 1963 S C 255.

to be a witness against himself. In the instant case when the appellant produced the currency notes to the police officer, there was no formal accusation against him. In any event there was no compulsion to produce the money he had on his person. Though he was asked to do so, he could have refused to comply with the police officer's request.¹

2. The right in Art. 20 (3) consists of three components.²

(i) It is a right pertaining to a person accused of an offence.

(ii) It is a protection against compulsion to be a witness.

(iii) It is a protection against such compulsion resulting in his giving evidence against himself.

3. A person summoned before the Sea Customs Authorities under S. 171-A of the Sea Customs Act 1878, is not in the position of a person accused of an offence. He is bound to appear before such authorities and answer all questions put to him.³ As proceedings before Sea Customs Officers are not Judicial Proceedings nor do such officers constitute Courts, Section 132 of the Evidence Act cannot apply to such proceedings.³

4. An order of a Magistrate under S. 94 Cr. P. C. calling upon an accused to produce documents that incriminate him does violate Art. 20 (3). This is different from an order directing the Police to search or seize documents in possession of the accused.⁴

5. It is implicit in clause (3) of Art. 20 that unless there is an element of compulsion there cannot be an infringement of any fundamental right. So if the accused is passive and finger prints are taken, there is no violation of the right. But if he is made to give under duress and some compulsion is used there is violation of the guaranteed right.⁵

6. A woman's admission to doctor when examined that she had given birth to a child recently which she threw down a ventilator, is admissible when the Doctor is examined as to the result of his examination. For she was not then accused of any offence.⁶

7. An accused cannot be summoned under S. 94 Cr. P. C. to produce self-incriminating documents.⁷ The word 'person' includes a company.⁷

8. A general enquiry and investigation into the affairs of a company is not an investigation which starts with an accusation contemplated under Art. 20 (3). So if a person is called upon under S. 240 of the Company's

1. *Mohammad Dastgir v. State of Madras*, A I R 1960 S C 756: 1960 S C J 726 refers to A I R 1954 S C 300.

2. *Madhava Naik v. Popular Bank Ltd.*, A I R 1961 Ker 14.

3. *Shankerlal v. Collector of Central Excise*, A I R 1960 Mad 225.

4. *Gurpurb Singh v. S. Aulan Singh*, A I R 1960 J & K 55, A I R 1951 Cal 101 (F. B.) held not good law.

5. *Nazir Singh Zunda Singh v. The State*, A I R 1959 Mad Pra 411 relies on A I R 1954 S C 300.

6. *Viran Wali v. The State*, A I R 1961 J & K 11.

7. *State of Maharashtra v. Nagpur Electric Light and Power Co. Ltd.*, A I R 1961 Bom 242; see also A I R 1961 Guj 137.

Act (1956) to give evidence and produce documents he cannot be a person accused of an offence.¹

9. It was in *Kathi Kalu Oghad's* case² that the Supreme Court finally set out the implications of the phrase 'compelled to be and witness against himself.' The decision though it lays down the law, is open to criticism.³ The decision lays down :—

- (a) An accused person cannot be said to have been compelled to be a witness against himself, simply because he made a statement while in police custody, without anything more indicative of compulsion. The mere questioning of an accused by a police officer resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion.
 - (b) To be a witness is not equivalent to 'furnishing evidence' in its widest significance so as to include also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused. The observations of the Supreme Court in A. I. R. 1954 S. C. 300 that S. 139 of the Evidence Act has no bearing on the connotation of the word 'witness' are not entirely well founded in law.⁴
 - (c) Giving thumb impressions or impressions of foot or palm or fingers, or specimen writings or showing parts of the body by way of identification are not included in the expression to be a witness—(Per Majority).
- Per S. K. Dass, A. K. Sarkar and K. C. Das Gupta JJ.—An accused person when he is given specimen handwriting or impressions of his fingers or palms, or foot does not furnish evidence against himself in so doing within the meaning of Art. 20 (3)⁵
- (d) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or otherwise—(Per Majority).⁶
 - (e) If self-incriminatory information is given by an accused without compulsion, S. 27 Evidence Act does not infringe Art. 20 (3).
 - (f) In order to bring the statement in question within the prohibition of Art 20 (3) the accused must have stood in the character of an accused person at the time he made the statement. That he became an accused, any time thereafter is not enough. (Per majority, rest expressing no opinion).

1. *Raja Narayanlal Bansilal v. Maneek Phirg Mistry*, A I R 1961 S C 29 : (1961) 1 S C J 353.

2. *State of Bombay v. Kathi Kalu Oghad*, A I R 1961 S C 1808 relies on A I R 1960 S C 756. Distinguishes A I R 1954 S C 300.

3. Vide in this series Vol III P and Vol IV for further discussion.

4. Per Majority but S. K. Das, A. K. Sarkar and K. C. Das Gupta to the contrary in A I R 1962 S C 1808 Supra.

5. A I R 1960 Cal 32 reversed, A I R 1960 Kerala 392 (F. B.) overruled.

6. *Ibid.*, S. K. Das, A. K. Sarkar and K. C. Das Gupta to the contrary.

10. The emphasis is on a compulsory disclosure of a guilt by an accused person in a criminal matter, and the right does not extend to a proceeding which does not involve punishment for the commission of crime.¹ The proceedings under S. 185 of the Companies Act (1913) against the Managing director are not such proceedings. It does not matter if a criminal prosecution is also then pending. As a witness the Managing Director could not claim protection beyond the ambit of S. 132 of the Evidence Act, under which also the privilege of silence was restricted to real dangers and not to remote possibilities.¹ The protection under Art. 20 (3) could be involved only when (1) the person must be accused of an offence and (2) he should not be compelled to give evidence against himself. A formal change is necessary and not a mere stage in investigation.² The protection against compulsory self-incrimination will be largely illusory if it was to be held that compulsion is barred by the Constitution Compelled testimony may nevertheless be used against the accused.³ The principle of protection against testimonial compulsion embodied in Art. 20 (3) is a principle of limited utility. It is a recognised doctrine that, when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention. The principle should not be extended to cover a wider field than what it has come to occupy.³

11. One consequence of the *Kathi Kalu Oghad's case* is the taking of finger impressions of the accused by an investigating officer even against his will would not contravene Art. 20 (3).⁴

12. Requiring an accused to produce a thing in his possession would not amount to testimonial compulsion, unless the thing to be produced by itself would be enough to establish his guilt.⁵

13. The word 'compulsion' means duress. The various circumstances preceding making of the statement by the accused should prove that his mind had been so conditioned by extraneous processes as to render the making of the statement involuntary and therefore extorted.⁶ He must also be an accused as such when he made the statement.⁶

14. Section 45-g of the Banking Companies Act 1948 is not violative of Art. 20 (3). Its object is not the accusation of a crime but the affirmation of a loss and even if such a report embodies accusations, it can only be in the popular sense and would not come under 'persons accused' within the meaning of Art. 20 (3).⁷

15. In *Bhagvan Das Goenka v. Union of India*⁸ the supreme Court reiterated that it is settled law that information extracted from a person would not

1. *Peoples Insurance Coy. Ltd. v. Sardul Singh Caveeshar*, A I R 1962 Punj 101 : I L R (1962) 1 Punj 468.

2. *Gulab Rai v. Rajasthan State*, I L R (1961) 11 Rad 646.

3. *State v. Balwant Ganpati Mulye*, I L R (1961) Bom 360 : 63 Bom L R 87, follows A I R 1954 S C 300.

4. *Sakendar Sheik v. State*, A I R 1962 Cal 36 relies on A I R 1959 S C 396.

5. *State v. Mst. Fatmabi*, 1962 M P L J (Notes) 204.

6. *R. K. Dalmia v. Delhi Administration*, A I R 1962 S C 1821 relies on A I R 1961 S C 1808.

7. *K. Joseph Angusti v. M. A. Narayanan*, 1962 Ker L J 1138 : I L R (1962) 2 Ker 255.

8. C. A. No. 131 and 132 of 1961, 1963 S C Notes 175 (C No. 285) Jt. on 20-9-63.

be admissible under Art. 20 (3) only where a formal accusation has already been made against a person concerned.

Article 21. Protection against Life and Liberty.

1. 'Procedure established by law' in Art. 21 contemplates a procedure which was followed by the various High Courts prior to the passing of the Constitution. It includes summary procedure based on fairness and justice without the trammels of technicality.¹

2. A warrant was issued for arrest under S. 69 Punjab Land Revenue Act, of a displaced person for arrears of Land Revenue. The record showed that this included arrears of tacavi loans for which no warrant could be issued under S. 30 of the Displaced Persons (Compensation and Rehabilitation) Act. The warrant was quashed as against procedure established by law.²

3. The word 'law' in Art. 21 refers to law made by the State. It does not apply to positive law or law in the abstract sense. 'Procedure established by law' means procedure established by Parliament or the legislatures of the State.³

4. In the case of preventive detention 'the procedure established by law' within the meaning of Art. 21 would be the procedure prescribed by the Preventive Detention Act. That is a fundamental right by itself.⁴

5. Reg 235 (b) of the U. P. Police Regulations which authorises 'domiciliary visits' was held violative of Art. 21 by the Full Court of the Supreme Court. Subba Rao and Shah JJ.⁴ would add that clauses (a) to (f) of Reg 236 were also violative of Art. 19 (1) and Art. 21.⁵ The domiciliary visit of officials is to search or inspect a private house. The words 'personal liberty' in Art. 21 are used as a compendious term to include 'within itself all the varieties of rights which go to make up the personal liberties' of a man other than those dealt within the several clauses of Art. 19 (1). Art 21 takes in and comprises the residue of such liberty.⁵ The majority view in the instant case⁶ was that the right of privacy was not a guaranteed right and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of the rights guaranteed in Part III of the Constitution.⁶ In this view search in private house during nights to ascertain one's movement is not objectionable. Not is picketing of the suspect's house by officials a restriction since the objective is to detect his movements. That knowledge of the suspect of such picketing would restrict his right of movement, was irrelevant. But Subba Rao and Shah J J held that all such methods "are in a real sense physical 'restraints since they engender physical fear channelling one's actions though anticipated and expected grooves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further the right to personal liberty takes in not only a right to be free from restrictions placed on his movements but also free from encroachments on his private life.

1. *Basanta Chandra Gosh* in the matter of, A I R 1960 Pat 430.

2. *Prithi Singh v. Punjab Government*, A I R 1960 Punj 155.

3. *Ramchandra Prasad v. State of Bihar*, A I R 1961 S C 1629.

4. *Prabhu Narain Singh v. Supdt. Central Jail*, 1 L R (1961) 1 All 427.

5. *Kharak Singh v. State of U. P.*, A I R 1963 S C 1295.

6. Though during an emergency declared by Presidential Order under Art. 352, a detention order cannot be questioned under Arts. 14, 21, and 22, yet the remedy open to a detenu can yet cover other grounds such as

- (a) that his detention order was mala fide
- (b) that the operative provision of the law under which he is detained suffers from excessive delegation. In this regard the next step the detenu may have to urge is that the detention under the Act is void under Art. 21 because the law referred in that article must be a valid law. This will raise a moot question as to whether this latter plea falls within the ambit of Art. 359 (1) and the Presidential Order under it. The Supreme Court felt a doubt if this would bar raising any such plea under Art. 21.¹
- (c) that the detention order was in violation of the mandatory provisions of the Defence of India Act.¹

Article 22. Protection against arrest and detention

General

1. Maintenance of public order can be one of the objectives of the grounds of detention. Denouncing Nehru-Noon Pact and instigation against personal safety of the Prime Minister are enough to attract the article. Stressing the need of forming a militia with the youths of the country and rousing passions by alleging that the Indian Prime Minister had no sympathy for West Bengal is enough to cause repercussions on the maintenance of public order.²

2. In a case of arrest and detention of foreigner for purpose of deportation, the High Court on Habeas Corpus petition opined that non-production of detainees within 24 hours to a magistrate vitiated the arrest. The State preferred an appeal under Art 136, while the detainees filed a suit and obtained interim orders of injunction against the State from deporting to Pakistan pending the disposal of the suit. In special leave majority view³ was that Art 22 (2) was adequately fulfilled by production of accused before the High Court the very next day. Subba Rao J dissenting held that non-production before a Magistrate forthwith within 24 hours vitiated the arrest, that the special leave appeal was meaningless since there was suit pending wherein injunction has been ordered against the State.

3. Production before a Magistrate or a Court of Magistrate within 24 hours is the same. Production in early hours of morning when not in court satisfies the requirements of Art. 22 (2).

4. Where by Presidential Order under Art. 359 (1) during an emergency remedy under articles 14, 21 and 22 are barred, no writ can lie. The duration of the emergency has nothing to do with the validity of the detention. The duration of the emergency is left to the Executive. In a democratic State

1. *Makhan Singh v. State of Punjab*, A I R 1964 S C 318.

2. *Naresh Chandra Ganguli v. State of W. B.*, A I R 1959 S C 1355.

3. *Uttar Pradesh v. Abdul Samad*. Per Majority (B. P. Sinha C J Ayyangar, Mudholkar Veerkatraiye Ayyar JJ.) A J R 1962 S C 1506 : I L R (1962) 2 All 547. Distinguishes A I R 1953 S C 10; A I R 1957 S C 688.

the effective safeguard against abuse of executive powers whether in peace or in emergency is ultimately to be found in the existence of enlightened vigilant and vocal public opinion.¹ Only the remedies are suspended during the emergency, not the rights. So Parliament cannot make laws in violation of those fundamental rights.¹

Art. 22 Clause (5)

1. Clause (5) of Art 22 merely provides a constitutional right of the detenu to be informed of the cause for his detention. S. 10 of the Preventive Detention Act authorises the Advising Board to call for such information as it may deem necessary from the appropriate Government or from any person or from the concerned detenu. So there can be no infringement of Art. 22 (5) if the Board refuses to accede to the detenu's request for records.²

2. The word "communicate the grounds" means effective communication so as to make the detenu know the grounds. If he does not know English the grounds should be in a language which he can understand.³

3. Where grounds supplied by District Magistrate were superseded by modified grounds supplied by State Government and there is nothing to show the District Magistrate's assent to this, there is a violation of clause (5) of Art 22. In the instant case there was no affidavit filed by the State that detention was necessary on the modified grounds.⁴

Article 22 clause (7)

1. The Preventive Detention Act 1950 does not provide for any circumstance under which a detenu may be detained for a period longer than three months without a reference to an Advisory Board. The omission of such a provision cannot, however, make S. 11 (1) or S. 11-A of the Act *ultra vires*. Where the opinion of the Board had been obtained and the final order of detention made within three months from the date of the original order of detention, the invalidity of the order or the question of Section 11 (1) or 11 (A) of the Act being *ultra vires* of Art. 22 (7) does not arise.⁵

Article 23. Protection of Traffic in Human beings and forced labour.

1. A custom requiring one day's free labour to the village headman for his being headman and for his first settlement in the village hits against Art. 23 (1).⁶

2. To bring the case within the mischief of clause (1) of Art. 23, it has to be established that a person is forced to work against his will and without payment. To be compelled to work under the Essential Services Maintenance Ordinance and to get payment for such service, cannot be termed 'Begar'.⁷

1. *Makhan Singh v. State of Punjab*, A I R 1964 S C 381.

2. *P. Srinibash Naidu v. State of W. Bengal*, A I R 1962 Cal 162.

3. *Harikishen v. State of Maharashtra*, A I R 1962 S C 911 : 64 Bom L R 522 : (1962) 25 C A 253.

4. *Prabhu Narain Singh v. Supdt. Central Jail*, I L R (1961) 1 All 427.

5. *Madan Shaw v. State*, A I R 1962 Cal 119.

6. *R. K. Tangkul v. R. S. Shailal*, A I R 1961 Mani 1.

7. *S. Vasudevan v. S. D. Mital*, A I R 1962 Bom 53.

3. Where there is enforcement of personal service as per stipulation under contract on pain of punishment for refusal to serve, it is 'begar'. The aggrieved party can sue for damages or compensation for breach of contract.¹

Article 25. Freedom of Conscience and free Profession of Religion.

1. Sections 11 (f) and (4) and 13 of the Durga Khwaja Saheb Act 1955, were held *ultra vires* of Art. 25 in *Durgah Committee Ajmer v. Syed Husain*.¹ The former section merely provides for the regulation of the discharge of the duties by the Khadims and nothing more. S. 11 should be read with S. 15 which makes it obligatory for the committee in exercise of its powers and discharge of its duties to follow the rules of Muslim law applicable to Hanafis. Section 13 authorises the committee to make provisional arrangements if a vacancy occurs in the office of the Sajjadanashin.²

2. In *Sardar Syedne Taher Saifuddin v. State of Bombay* the Supreme Court declared,³ that Articles 25 and 26 embody the principles of religious toleration that has been the characteristic feature of Indian civilization from the start of history, the instances and periods when this feature was absent being merely temporary aberrations. Besides they serve to emphasise the secular nature of the Indian Democracy which the founding fathers considered should be the very basis of the Constitution.

Article 26. Freedom to manage Religious Affairs

1. Where the right to perform santhi at the temple was confined by custom to a particular Brahmin community, and the State had the right of management and sold that right in public auction to the highest bidder subjecting it to the right of the 'santhi' custom, Art 26 (a) was in no way infringed.⁴

2. Article 26 (b) postulates that matters of religion include even practices which are regarded by the community as part of its religion. Such practices must be considered an essential and integral part of the religion. Otherwise even purely secular practices which are not essential or an integral part of religion may make a claim for being treated as religious practices within the meaning of Art. 26.⁵ If the right to administer properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it Art. 26 cannot apply. In the instant case² the endowments of the Durga have always been made on such terms as did not confer on the denomination represented by the Khadims the right to manage the properties endowed. The right was always in the hands of the officers appointed by the State who were answerable to the State. Hence S. 5 of the Durgah Khawaja Saheb Act 1955 was held *intra vires* of Art 26.

3. In *Sardar Syedna Taber Saifuddin v. State of Bombay*,⁶ the majority opinion struck down the Bombay Prevention of Ex-communication Act XLII

1. *Kadar v. Muthukoya Thangal*, A I R 1962 Ker 138 relies on (1910) 55 Law Edn. 191. Dissents from A I R 1952 Cal 496.

2. A. I. R. 1961 S C 1402 reversing A I R 1959 Raj 177.

3. Per Rajagopalayyengar, J., A I R 1962 S C 853.

4. *V. Raman Embraim v. Tahsildar*, A I R 1960 Ker 312.

5. *Durgah Committee Ajmer v. Syed Husain*, A I R 1961 S C 1402 reversing A I R 1959 Raj 177.

6. A. I. R. 1952 S C 853.

of 1949 as violative of Art 26 (b) in so far as it destroys the right of the Dai-ul-Mutlaq of excommunicating any member of the Dawood Bohra Community on religious grounds.¹ Since the decision of the Privy Council in A. I. R. 1948 P. C. 66, it is clear that the Dai-ul-Mutlaq is the head of the Dawoodi Bohra community and that he can ex-communicate any member of his community. This, the impugned Act renders invalid and thereby interferes with the right of the Dawoodi Bohra Community under Art. 26 (b). A consequence of ex-communication of a person is that he loses his right of enjoyment of his property. That the civil rights of a person are affected by the exercise of the fundamental right under Art 26 (b) is of no consequence. The right under Art 26 (b) could be saved only under Art 25 (2) but as the impugned act does not come within that saving clause, and the Act invalidates excommunication on any ground including religious grounds, it is a clear violation of the right of Dawoodi Bohra Community under Art 26 (b). For the *Dai* as the trustee of the property of the denomination can so administer it as to exclude dissidents and excommunicated persons from the beneficial use of such property. But B. P. Sinha C J in his dissent from the majority view held that Art 26 (b) should be read subject to Art 25 (2) (b) and that the Act aimed at fulfilment of the individual liberty of conscience guaranteed under Art. 25 (1) and not in derogation of it.

4. In a larger sense, an educational institution may be regarded as charitable.²

Article 29-Protection of Interests of Minorities

1. In the matter of admission to professional Colleges the number of marks obtained is not the only criterion to judge merit. There is no mechanical or absolutely objective measure that can be visualised. What is important is that the selection should be fair. Courts will not interfere in such selection.³

2. The Supreme Court held that 'OM' flag used in Election cannot be deemed a corrupt practice on the ground of language or religion within the meaning of S. 123 (3) of the Representation of Peoples Act 1951. This clause should be read with Art 29 (1). For political agitation for conservation of the language of a section of the citizens cannot be termed corrupt practice. The right guaranteed under Art 29 (1) is not subject to any reasonable restrictions unlike Art 19 (1).⁴

Article 30. Rights of Minorities to establish and administer Educational Institutions

1. In clause (1) of Art 31 the words 'of their choice' when read with Art 29 (1) postulates that a minority has a right not only to conserve its own language and culture but has also a right to establish educational institutions of its choice and to administer them in such manner as its members may choose. The State can have no authority to impose upon them any particular mode or method of administering them. But S. 4 (27) and S. 38 A of the Gujarati University Act and the relevant statutes 207, 208 and 290 framed under the purported authority thereunder at least prohibits one minority e.g.

1. *Ibid* overruling A I R 1958 Bom 183.

2. *Rev. Sidhrajibai Sobhaj v. State of Gujarat*, A I R 1963 S C 540.

3. *Prakash Chandra Nathulal Jain v. State of M. P.*, A I R 1962 M P 48.

4. *Jagdeo Singh Sidhanti v. Pratap Singh*, C A No. 936 of 1963 S C J Jmt 12-2-64—1964 S C Notes P 46 (C No. 42).

Anglo Indians from establishing their own institutions. It is no answer to state that the statute aims only at promoting the Gujarati language. The University has no power or authority to lay down or impose or enforce any particular language or languages as media of instruction in educational institutions. In the instant case it was held that the authorities of the St. Xavier's College can decide to instruct its scholars in a language of their choice. The impugned provisions clearly violate Arts 29 (1) and 30 (1).¹

2. Art 30 (1) guarantees the right which may be characterised as part of the right to freedom of religion, in order that it may not be subjected to the vicissitudes of political controversies or the whims of political majorities. This does not mean that the minority of a village has an exclusive right to conduct a non-denominational school in the village, unmolested by any competition from the majority population of the village. So the setting up of a rival school by a member of the 'majority community' cannot be characterised as a violation of the right of the minority under Art 30 (1).²

3. School managed by Brahmo Samaj is entitled to the protection as a religious minority under Art 30 (1)¹ though majority of students are not of Brahmo faith and no instructions in that faith are given. This does not debar the State Govt. to impose regulation as to maintenance of discipline or standard of efficiency and so in that regard a direction under Art 226 can issue to the managing committee of the school to hand over charge of the school to the committee appointed by the Samaj. Any order of Government interfering with the rights of the Samaj to management and administration of school is *ultra vires* and void.³

4. The Bankipore Brahmo Samaj which established and administered the Bankipore Balika Vidyalaya was held to have the right to administer the same according to its choice. The order of the Board of Secondary Education of the Government interfering with the administration of the school under S. 8 of the Bihar High Schools (Control and Regulation of Administration Act XIII of 1960 was held illegal and *ultra vires*.⁴

5. Rule 5 (2) of the Rules made by Bombay Government for Primary Training Colleges and Rules 11 and 14 for recognition of Private Training Institution, in so far as they relate to reservation of seats therein under orders of Bombay Government and directions given purgnant thereto regarding reservation of eighty per cent of the seats and the threat to withhold grant-in-aid and recognition of the College was held as violative of Art. 30 (1).⁵ The Supreme Court in the instant case⁶ laid down in broad terms the objectives of the guarantee thus: "All minorities, linguistic or religious have by Art. 30 (1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of the right under Art. 30 (1) would to that extent be void. Regulations made in the true interests of efficiency

1. *Sri Krishna Ranganad Mudholkar v. Gujarat University*, A I R 1962 Guj 88 (F. B.) relies on A I R 1958 S C 956 ; A I R 1954 S C 119, A I R 1955 S C 781.

2. *Rev. Fr. Joseph Callian v. State of Kerala*, A I R 1962 Ker 33.

3. *Dipendra Nath Sarkar v. State of Bihar*, A I R 1962 Pat 101 (F. B.) distinguishing A I R 1957 S C 529.

4. *Dipendra Nath Sarkar v. State of Bihar*, A I R 1963 Pat 54, relies on A I R 1958 S C 956 and A I R 1958 Pat 359.

5. *Rev. Sidharaj Bhai Sabbay v. State of Gujarat*, A I R 1963 S C 540.

of instruction, discipline, health, sanitation, morality, public order and the like are undoubtedly to be imposed. Such regulations are not restrictions on the substance of the right and they secure the proper functioning of the institutions in educational matters.

Clause (2) of Art. 30 is only a phase of not discrimination clause of the Constitution and does not derogate from the provisions in clause (1). The clause is moulded in terms negative: The State is thereby enjoined not to discriminate in granting aid to educational institutions on the ground that the management of the institution is in the hands of a minority, religious or linguistic, but the firm is not susceptible of the interference that the State is competent otherwise to discriminate so as to impose restrictions upon the substance of the right to establish and administer educational institutions by minorities, religious or linguistic. The right established by Art. 30 (1) is intended to be a real right for the protection of the minorities in the matter of setting up educational institutions of their own choice. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution effective as an educational institution while retaining its character as a minority institution. Such regulation must satisfy a dual test—the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.”¹

Article 31. Compulsory Acquisition of Property.

Public Purpose

1. The definition of public purpose should be elastic. Even when the scheme is in favour of individuals, if public prosperity, public welfare or public convenience is served, it is *intra vires* e.g.: Housing accommodation for Harijans.² Acquisition of land by the Government at the instance of corporation for widening lane is a public purpose.³

2. It is not absolutely necessary to the validity of the land acquisition proceedings that the notification should state that the land was needed for a public purpose. The requirements of the law will be satisfied, if in substance it is found on investigation that the appropriate Government is satisfied as a result of the investigation that the land was needed for the purposes of a company, which would amount to a public purpose under Part VII of the Land Acquisition Act.⁴ Constructing dwelling houses and providing amenities for the benefit of the workmen employed by it and construction of some work of public utility serve a public purpose.⁴

3. Article 31 (2) makes the existence of a public purpose a condition precedent to every acquisition or requisition of property. The provisions of the Constitution must prevail over legislation and if an enactment violates

1. *Ibid.*

2. *Moosa v. State*, A I R 1960 Ker 96, relies on A I R 1952 Bom 461, A I R 1930 Mad 798, A I R 1914 P C 20 distinguished.

3. *Babu Barkya Thakur v. State of Bombay*, A I R 1960 S C 1203 relies on A I R 1955 S C 41.

4. *Jagdish Narain Babulal Jaiswal v. Collector*, A I R 1962 M P 146 relies on A I R 1950 S C 222; A I R 1952 S C 252 and A I R 1956 S C 294.

Constitutional provisions, no finality can be attached to the opinion of an authority even though the express words of the statute make it so.⁴

4. The requisition of godowns for storing Government food grains collected for distribution in deficit areas, with no profit motive, is a public purpose.¹

Clause (1) of Article 31.

1. The plain meaning of the clear words used in clause (1) enables the State to discharge its functions in the interest of social and public welfare which the State in America can do in exercise of police power. For social control and public good cannot be divorced from police power.²

2. The right to pension is 'right to property' within the meaning of Art. 31. So, if the grant of life disability pension to petitioner serving as clerk in the Army on recommendation of the Medical Board, is subsequently cancelled as a result of further medical examination, the right of the petitioner is jeopardised. His pension when not only curtailed but also abolished altogether by the executive fiat of the Government with no justification or even notice, it was held to be clearly arbitrary and *ultra vires*. There can be no justification pleaded on the vague formulae of administrative grounds.³

3. Even if Passport was property within the meaning of Art. 31, the revocation and impounding of the same was within the discretion of the Government of India. No fundamental right arises for a writ proceeding.⁴

4. The expression 'By authority of law' in Art. 31 is different from the word 'laws in force' used in Art. 20, which later term indicates that even if a criminal law is enacted by any legislature retrospectively, its retrospective operation will be controlled by Art. 20 (1). A law in force at the time postulates actual factual existence of the law at the relevant time and that excludes the retrospective application of any subsequent law. On the other hand under Art. 30 (1) 'by authority of law' postulates that if a subsequent law passed by the legislature is retrospective in its operation, it would satisfy the requirement of Art. 31 (1) and would validate the notification issued under the prior Act.⁵ In this view it was held that S. 26 of the Madras Electricity Supply Undertakings (Acquisition Act) (XXIX of 1954) operates retrospectively validating actions taken under the provisions of the earlier invalid Madras Act XLIII of 1949.⁵

5. The Coal Bearing Areas (Acquisition and Development) Act or any of its provisions were held *intra vires* of Art 31. The power to legislate for regulation and development of mines and minerals under the control of the union would by necessary implication include the power to acquire mines and minerals. Power to legislate for acquisition of property within the protection offered under Art 31 cannot be questioned.⁶ Subbarao J in his dissenting view held that the Union cannot overstep into the State field and

1. *Jagadish Narain Babulal Jaiswal v. Collector*, A I R 1962 Madh Pra 146.

2. *Kochunni v. State of Madras and Kerala*, A I R 1960 S C 1080.

3. *Bhagwant Singh v. Union of India*, A I R 1962 Punj 503, relies on A I R 1960 Andh Pra 420, A I R 1931 P C 248; follows 1959 S C J 1207: A I R 1959 S C 149.

4. *Subodha Chandra Das Gupta v. Union Territory of Tripura*, A I R 1962 Tri 7.

5. *West Ramnad Electric Distribution Co. Ltd., v. State of Madras*, A I R 1962 S C 1753.

6. *State of W. B. v. Union of India*, A I R 1963 S C 124 1241.

acquire the lands owned by the State, including coal mines and coal bearing lands. That will be *ultra vires*.⁶

6. Acquisition under S. 18 (c) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act 50 of 1948 was held a violation of Art. 31, where the reservation of land was not for common purposes. Taking possession of land for such purposes without any compensation being paid was unconstitutional. Though upholding the constitutional challenge might result in administrative inconvenience the court was bound to quash the scheme in respect of the items challenged. In a conflict between administrative inconvenience and constitutional guarantee the latter must prevail.¹

Clause (2) of Article 31.

1. Clause (2) imposes certain restrictions on the exercise of the power of eminent domain. The Article, however, does not confer this power on the Government. It only contains some safeguards in regard to the exercise of that power.²

2. Acquisition of land for companies under the Land Acquisition Act (1894) is for a public purpose. Even if there be doubt, it would be saved by the provision in Art. 31 (5) (a) as an existing law.³

3. Reinstatement of ejected tenant under S. 57 of the U. P. Tenancy (Amendment) Act IX of 1947 is not acquisition under S. 229 of the Government of India Act 1935 or under Art. 31 of the Constitution. Further the Act is saved by Art. 31 (5) as existing law.⁴

4. The Manipur Hill peoples' rights over lands in Hill villages recognised in Sections 60 and 64 of the Manipur, cannot be ignored by Government by executive fiat treating them as mere licences. The deprivation of their rights can only be done under Art. 31 (2) read with the Land Acquisition Act.⁵

5. If the purpose for which the land is being acquired by the State is within the legislative competence of the State, the declaration of the Government under S. 6 L. A. Act (1 of 1894) will be final subject to one exception. Such an exception arises where there is a colourable exercise of power, in which event the protection of S. 6 (3) of that Act will not extend.⁶ S. 6 is substantially complied with even when a token contribution is made by the State towards the cost of acquisition. The word 'part' does not necessarily mean a substantial part. It will be open to the Court in every case to examine if the contribution made by the State satisfies the requirement of the law.⁶

6. Though the inamdar is not paid cash compensation under the Andhra inams (Abolition and Conversion into Ryotwari) Act 1956, yet under S. 4

1. *Gurudas Singh v. Director of Consolidation of Holdings*, A I R 1964 Punjab 117.

2. *Inamdars of Sulahanagar Colony v. Government of A. P.*, A I R 1961 Andh Pra 523.

3. *Barkya Thakur v. State of Bombay*, A I R 1960 S C 1203.

4. *Khairunnisa v. Ganga Prasad*, A I R 1961 All 191.

5. *Lintang Khuttakpa v. Dy. Commr. of Manipur*, A I R 1961 Manipur 31.

6. *Somavanti v. State of Punjab*, A I R 1963 SC 151 (Per majority, Subba Rao J dissenting). approves A I R 1945 Mad 394 (F B) overrules A I R 1929 Mad 1009. Dist. (1878) 3 A C 483.

(3) of that Act compensation is made in the form of a ryotwari Patta for one third of the inam in lieu of extinguishment of his rights. Hence there is no violation of Art. 31.¹

7. The Khatedari rights conferred under S. 15 of the Rajasthan Tenancy Act (III of 1955) when taken away under S. 15 A was held to contravene Art. 31 (2), as it provided no compensation.²

8. Life membership of the Senate of a University is not 'property' within the meaning of the article. So Amendment of S. 17 (ii) of the Bihar Act XIV of 1960 by S. 12 (ii) of Bihar Act 11 of 1962 is not invalid. The property of the University is vested in the University and the Senate has only a right of management which cannot be termed as property.³

9. The Supreme Court held that fixing payment of compensation as on 28-4-1947 under the Madras Lignite Acquisition of land (Act. 1 of 1953) was violative of Art. 31 (2). The result of the impugned provision was to freeze for the purposes of acquisition the prices of land in the area to which it applies and the owners are deprived of the benefit of the appreciation of land values since April 28, 1947 whenever the notification under S. 4 (1) may be issued and also of non-agricultural improvements made in the land after that date.⁴

Clause (3) of Article 31

1. Clause (3) presents the mode in which the law that is to govern the acquisition or requisition of a property is to be made. It is on a par with the proviso to Art. 200 and the same results follow in case these provisions are not followed. Clause (3) of Art. 31 is not a limitation on the power of the State to acquire or requisition the property within the purview of Art. 31 (2). In this view the Hyderabad Tenancy and Agricultural Lands Act XXI of 1950 was held ineffective and inoperative. The Act not having been reserved for the consideration of the President and assented to by him becomes inoperative. It was further held that S. 31 E which is but a part of the whole scheme envisaged by the Act, cannot live apart from the Act simply because that Section was assented to by the President.⁴

Art. 31. Clause (5)

1. In *Smt. Rani Ratna Probha Devi v. State of Orissa*,⁵ the Supreme Court upheld the Orissa Private Land Rulers (Assessment of Rent) Act 1958 as *intra vires* of Art. 31. The Court said "What the Act has purported to do is to authorise the levy of assessment in respect of lands which till then have been exempted from the said levy, and as Art. 31 (5) (b) (1) provides nothing contained in Cl 2 shall affect the provisions of any law which the State may make for the purpose of imposing or levying any tax or penalty. If the Orissa State Legislature has imposed a tax in the form of assessment of private

1. *Suryanarayana Raju v. State of Andh Pra.*, A I R 1963 And Pra 105.

2. *Jassu Ram v. State of Rajasthan*, A I R 1963 Raj 72.

3. *Baleswar Prasad Chaudhry v. State of Bihar*, A I R 1963 Pat 373 relies on A I R 1957 Pat 617, A I R 1954 SC 119,

4. *State of Madras v. Namasivaya Mudaliar*, C A No. 6-12 of 63 Jgmt on 3-3-1964.—1964 S C Notes 63 (C No. 61).

5. *Inamdars of Sulahnagar Colony v. Govt. of A. P.*, A I R 1961 Art. P. 523.

6. *Ibid.*

land of rulers, clearly it has not provided either to deprive the rulers of their property, or to acquire or requisition the said property, it is a simple measure authorising the levy of a tax in respect of agricultural lands and as such, it is entirely outside the purview of Art. 31."¹

Article 31-A. Saving of Laws Providing for Acquisition of Estates etc.

1. In *Kochunni case*² it was pointed by the Majority Bench that Art. 31-A as amended by Fourth Amendment Act 1955 is concerned with land tenure called 'estate'. It provides for its acquisition, or the extinguishment or modification of the rights of the land holder or the various subordinate tenure holders in respect of their rights in relation to the estate. The object was to bring about a change in the agricultural economy but not to recognise or confer any title in the junior member of a family.

Hence the Madras Mammak Kathayam (Removal of Doubts) Act XXXII of 1955 does not modify any of the rights appertaining to 'Janmam right' but only confers shares in the property on other members of tarwad. The sole title of the Sthanee is not recognised and the members of the tarwad are given rights therein. The Act does not effectuate agrarian reform and regulate the rights *inter se* between landlords and tenants. Art. 31-A does not therefore apply to the Act.

2. The Bombay Personal Inams Abolition Act 1953 (XLIII of 1953). Section 17 (5) is within the application of Art. 31-A and saves it from the operation of Art. 31, though that section provides that no compensation is to be paid for the loss to the Inamdar of what he used to get because of the difference between the quit rent and full assessment.³

3. The East Punjab Holdings (Consolidation and Prevention of Fragmentation) (Second Amendment and Validation) Act XXVII of 1960 is saved by Art. 31-A. The article applies equally to an entire estate or to a portion of an estate. The act of handing over the management and possession of the land of the proprietors to the village Panchayat amounts to acquisition by the State which has been defined by Art. 12.⁴

4. Art. 31-A saves the following :—

The Bombay Act XIII of 1956⁵ in its application to the Bombay Act XCIX of 1958.

The Bihar Land Reforms (Amendment) Act XVI of 1959.⁶

The Aghat Tenure and Ijras Abolition Act (Bom LXV of 1959).⁷

1. W. P. No. 79 of 1963 Judgment dated 23-1-64. 1964 SC Notes P 9 (C No. 5 A) approves *Pratap Kesari Deo v. State of Orissa*, A I R 1961 Or 131.
2. *Kochunni v. States of Madras and Kerala*, A I R 1960 S C 1080.
3. *Gangadhara Rao Narayan Rao Majumdar v. State of Bombay*, A I R 1961 S C 288 : 63 Bom L R 511.
4. *Kishan Singh v. State of Punjab*, A I R 1961 Punj 1 (F, B).
5. *Mahadeo Paikaji Kolhe v. State of Bombay*, A I R 1961 S C 1517.
6. *State of Bihar v. Rameshwar Pratap*, A I R 1961 S C 1649.
7. *Joshi Jayanti Lal v. Gujarat State*, A I R 1962 Guj 297.

The East Punjab Holdings (Consolidation and Prevention or Fragmentation) Act 1948.¹

The Himachal Pradesh Tenants (Rights and Restoration) Act 1952
Section 3.²

5. Article 31-A has to be strictly construed. The Court has to consider if the rights which are sought to be taken away or extinguished fall within the scope of that article.³

6. Lands held in ryotwari Pattadars in South Kanara District are not estates. So the Kerala Agrarian Relations Act IV of 1961 is not saved by Art. 31-A, from attack under Articles 14, 19 and 31.⁴ It may be noted the proposed 17th Amendment of the Constitution seeks to liberalise the term 'estate' to include even ryotwari lands.⁵ In *Purushottaman Namboderi v. State of Kerala*⁶ the Supreme Court was clearly of the view that the person holding the estate should be the proprietor of the soil and should be in direct relationship with the State paying land revenue to it except where it is remitted in whole or in part. If therefore a term is used or defined in any existing law in a local area which corresponds to this basic concept of 'estate' that would be the local equivalent of the word 'estate' in that area. It is not necessary that there must be an intermediary in an estate before it can be called an estate within the meaning of Art. 31-A (2) (a) though in many cases of estates such intermediaries exist. The *Pandavarka Vempattam* is such a local equivalent of an estate, and the holder thereof is not a tenant but holds proprietary right in the soil itself, subject to the rights as to metals and minerals reserved in favour of the State.⁶ The *Puravaka lands* also fall under the term estate. If both these tenures are operated against in the impugned statute which is however protected by the provision in Article 31-A (1).

7. The Kerala Agrarian Relations Act is protected under Art. 31-A with respect to (1) Jenman lands (2) Inam lands other than *Viruthi Lands* (3) *Kandukrishi lands* assigned to occupants under the Travancore Cochin *Kandukrishi* Land Assignment Rules (1958) and (4) Lands assigned by the Government after levying the price thereof. But the Act was struck down in respect of other tenures in that area as *Pandavarka lands Kandukrishi lands* (other than the three categories detailed above), *Sri Pandaravoka lands* and *Thiruppuvanam lands*.⁷

8. The Madras Inams (Assessment Act) 40 of 1956 was held to be not colourable legislation. The Assessment provided was held not to amount to resumption. Even if the Act was inconsistent with the rights under Arts. 14, 19 and 31, it was saved by Art. 31-A.⁸

1. *Jagat Singh Dadar Singh v. State of Punjab*, A I R 1962 Punj 221 (F.B.). *Bhikhan Bobla v. Punjab State*, A I R 1963 Punj 255 (F.B.) see A I R 1959 S C 564 ; A I R 1964 Punj 90.

2. *Mahinder Singh v. Balak Ram*, A I R 1963 H P 28.

3. *Joshi Jayanti Lal Lakshmi Shankar v. Gujrat State*, A I R 1962 Guj 297.

4. *Karimbil Kunhikorman v. State of Kerala*, A I R 1962 S C 723.

5. For Criticism of the proposed amendment vide Vol. IV of this treatise.

6. A I R 1962 S C 694 : (1962) I S C J 477.

7. *Padmanabha Govindarao Nambudripad v. State of Kerala*, A I R 1963 Ker 86 (F.B.) : I L R (1963) 1 Ker 5.

8. *S. V. Devasthanam v. State of Madras*, A I R 196 Mad 90.

Article 31-B. Validation of Certain Acts and Regulations.

The following Acts are saved by Art. 31-B :

- (a) Proviso to S. 11 (1) of The U. P. Land Acquisition (Rehabilitation of Refugees) Act XXVI of 1948.¹
- (b) Sections 45 of The Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) is protected by Art. 31-B with Schedule IX item 10 of the Constitution of India.²

*Article 32. Remedies for the Enforcements of the Rights***General**

1. New plea pending an elucidation of new facts, the Supreme Court has power to consider under Art. 32, even though there is no sufficient material on the record.³ The Court can by itself consider further evidence or authorise the subordinate tribunal to record the evidence ; such evidence may be oral or by affidavits and documents.

2. The citizens are ordinarily entitled to appropriate relief under Art. 32 when it is shown that their fundamental rights have been illegally or unconstitutionally violated. The granting of the appropriate relief under that article is not discretionary.⁴ The expression 'appropriate proceedings' has reference to proceedings that may be appropriate having regard to nature of the order, direction or writ which the petitioner seeks to obtain from this Court.⁴

3. When one State collected tax under the Central Sales Tax Act on behalf of Central Government and another State threatens to recover again the tax on the same turnover on behalf of the Central Government, there is a clear violation of the right to hold property. Resort to Art. 32 for remedy is then most appropriate.⁵

4. Allegations against persons in authority in a writ petition under Art. 32 must be properly answered by the authority. Where serious allegations were made against the Chief Minister of Punjab, it was pointed out by the Supreme Court that he owed a duty to the Court to counter allegation by his own affidavit and not leave it to secretaries and other officers who can only speak from records.⁶

5. Where by executive action without any authority of specific rule of law, the right to property of a person is interfered with, such executive orders are liable to be quashed.⁷

1. *State of U. P. v. H. H. Maharajah Brijendra Singh*, A I R 1961 S C 14; (1961) 1 S C J 622; 1961 All L J 1.

2. *Rajah V. V. M. Gopal Krishna Yachendra v. Raja V. V. S. K. Krishna Yachindra*, A I R 1963 S C 842.

3. *Kochunni v. States of Madras and Kerala*, A I R 1960 S C 1080.

4. *Durga v. State of U. P.*, A I R 1961 S C 1457 observations in A I R 1955 S C 3 and A I R 1955 S C held obiter.

5. *Bombay v. S. R. Sarkar* A I R 1961 S C 65; (1961) 1 S C R 379.

6. *A. P. Kapoor v. Sardar Pratap Singh Kairon*, A I R 1961 S C 1117; (1961) 2 S C R 143.

7. *Bishan Das v. State of Punjab*, A I R 1961 S C 1570 relies on A I R 1954 S C 415; A I R 1953 S C 215.

6. Khorposh grants to junior members of the family of Rulers of Native States is property and so every periodic deprivation of the money allowance gives the members a fresh right to approach the Supreme Court for relief under Art. 32.¹

7. Administrative orders under S. 68-F 2 (2) (a) and (b) of the Motor Vehicles Act are not quasi Judicial so as to be challenged under Art. 32.²

8. 'Pondicherry' is not territory acquired within the meaning of Art 1 (3) (c) and so no appeal can lie to the Supreme Court from a judgment of the Pondicherry Court. Art. 32 cannot be invoked also.³ This was so because of the nature of the relief sought and the authority against whose orders the relief was claimed. The Supreme Court was of this view after it received answers to the queries it addressed to the Government of India as to details of the agreement between India and France as to transfer of the territory of Pondicherry (vide A. I. R. 1963 S. C 53.). Their Lordships⁴ however observed: "No appeal lies to the Supreme Court under Art. 135 (1) from the orders of the Chief Commissioner Pondicherry acting as appellate authority under S. 66. Motor Vehicles Act 1939 which was extended to Pondicherry by the Government of India with effect from June 19, 1959 But the powers of the Supreme Court under Art. 32 of the Constitution are not circumscribed by any territorial limitation. It extends not merely over every authority within the territory of India but also those functioning outside, provided that such authorities are under the Control of the Government of India." Though *de facto* Control had come over to the Government of India, *de jure* Control we had not yet passed to it. The Supreme Court observed.⁵ "There is enough power in Government even at the stage of the *de facto* transfer to remedy the situation. By appropriate action under the Foreign Jurisdiction Act or by Parliamentary Legislation under the entry "Foreign Jurisdiction" the appellate jurisdiction of the High Court or of the Supreme Court could be enlarged under Articles 225 and 228 (1) respectively so as to afford an adequate remedy for the inhabitants of these areas."

9. A quasi-judicial authority acting without jurisdiction by deciding collateral fact wrongly can be questioned in a writ proceeding.⁶

10. Where an order imposing confiscation and penalties under S. 167 (8) of the Sea Customs Act 1878, is made by a quasi judicial authority acting with jurisdiction under the said taxing which is *intra vires* the order cannot be challenged as violating Art. 19 (1) (f) and (g) on the sole ground that it is based on misconstruction of a provision of the Act inserted therein by a valid order (viz para 6 of the French Establishments Application of Laws Order 1954). Such an order cannot be questioned under Art 32 of the Constitution.⁷

1. *Promod Chandra v. State of Orissa*, A I R 1962 S C 1288.

2. *Kalyan Singh v. State of U. P.*, A I R 1962 S C 1183.

3. *Masthan Sahib v. Chief Commissioner Pondicherry*, A I R 1962 S C 797 judgment dated 8-12-61.

4. *Ibid* A I R 1963 S C 533 judgment dated 28-4-1961.

5. A I R 1962 S C 797 at 804.

6. *State Trade Corporation of India v. State of Mysore*, A I R 1963 S C 548.

7. *Pioneer Traders v. Chief Controller of Imports and Exports Pandicherry*, A I R 1963 S C 734.

11. Where the tax has been levied by the tax officer not by misconstruing certain provisions of a valid Act, but is levied by him even though he has no jurisdiction to assess the tax on account of the invalidity of the rule under which the assessment is made, a writ can be under Art. 32.¹

12. Rule 12 of order 35 of the Supreme Court rules (1950) was held *ultra vires* as the giving of security for costs in a petition under Art. 32 retards the assertion or vindication of fundamental right to move the Supreme Court under Art. 32. Such a rule cannot be justified under Art. 142 (1) or 145 (1) (f) of the Constitution.² (See for full discussion in this Treatise Vol. III and Vol. IV pp.)

13. A permanent lessee of a land can maintain a writ petition though his leasehold right might be disputed or affected by subsequent legislation.³ Even if a joint co-owner does not join the petition, the petition is sustainable. In suits different rules prevail as joint owner must join the suit to give effective remedy.³

14. It is erroneous to assume that before the jurisdiction of the Supreme Court under Art. 32 is invoked the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords. Once a fundamental right is infringed it is at once the duty of the Supreme Court to afford relief to the aggrieved party by appropriate orders in that behalf.⁴

15. When the State Government delegated its power given under S. 21 (4) East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act to hear appeals to an officer, the order passed by him is tantamount to an order of the State Government. There is no further power of revision under S. 42 of the Act and any order thereunder is liable to be quashed under Art. 32.⁵

16. Only natural persons can be citizens to have resort to Art. 32 for violation of Art. 19. So State Trading Corporation cannot maintain a petition under Art. 32.⁶

17. Clause (4) of Art. 32 provides that the guaranteed fundamental right can be suspended in accordance with the provisions of the Constitution. Thus when the President of India on 3-11-1962 by an order under Art. 359 (1) suspended the right of any person to move any court for the enforcement of the rights conferred by Articles 21 and 22 during the period of emergency. The right to move for *habeas corpus* in respect of a person detained under R. 30 of the Defence of India Rules 1962 remained thus suspended.⁷

18. Shareholders cannot maintain a petition under Art. 32 was the answer given by the Supreme Court in the *Tata Engineering Locomotive Co.*

1. *A. T. B. Mehtab Majid and Co. v. State of Madras*, A I R 1963 SC 928.
2. *Prem Chand Garg v. Excise Commissioner of U. P.*, A I R 1963 SC 996.
3. *Mahendra Lal Jaini v. State of U. P.*, A I R 1963 SC 1019.
4. *Kharak Singh v. State of U. P.*, A I R 1963 SC 1295.
5. *Roop Chand v. State of Punjab*, A I R 1963 SC 1503 (Per majority Kapur and Hidayatt-Ullah JJ. contra).
6. *State Trading Corporation v. C. T. O.*, A I R 1963 SC 1811 refers to A I R 1958 SC 507, A I R 1961 SC 65.
7. *Mohan Choudhry v. Chief Commissioner of Delhi*, A I R 1964 SC 173.

Ltd. v. State of Bihar.¹ Their Lordships posed the question "Can we lift the veil of the petitioners (company) and say that it is the shareholders who are really moving the Court under Art. 32, and so, the existence of the legal and separate entity of the petitioners as a corporation or as a company should not make the petitions filed by them under Art. 32 incompetent? We do not think we can answer this question in the affirmative."

19. The sweep of Art. 359 (1) and the Presidential Order issued under it during an emergency is wide enough to include all claims made by citizens in any Court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights in the Presidential Order (in the instant case Art. 14, 21, and 22). Proceedings taken by a citizen either under Ars. 32 (1) or under Art. 226 (1), or under S. 493 (1) Cr. P. are hit by Art. 359 (1) read with the Presidential Order issued under it.²

Res judicata

1. In *M. S. M. Sharma's case*,³ a petition under Art. 32 against the Chairman and members of the Committee of Privileges of the Bihar State Assembly, for prohibiting the publication of report of proceedings of the House was dismissed. The same question raised in a subsequent petition was held barred by res judicata.³

2. In *Ujjain Bai State of U. P.*⁴ the Supreme Court held that an order of assessment made by an authority under a taxing statute which is *intra vires* and in the undoubted exercise of its jurisdiction can not be challenged on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder. The validity of such an order cannot be questioned in a writ proceeding under Art. 32. The proper remedy for correcting an error in such an order is to proceed by way of appeal or if the error is an error apparent on the face of the record then by an application under Art 226. Article 32 does not give the Supreme Court an appellate jurisdiction such as is given by Arts. 132 to 136.

3. The bar under S. 6 (3) Land Acquisition Act can stand in the way of the Supreme Court finding out under Art. 32 as to whether an acquisition is for a public purpose; for the Act is a preconstitution law excepted by Art. 31 (5).⁵

Article 32 (2-A).

1. Error must be apparent on the face of the record to attract a writ.⁶

2. The J. & K. High Court can under Art. 32 (2-A) enforce a fundamental right. But if all that is averred is that the procedure prescribed by the

1. Writ. Petn. No. 112,113 of '61 cited in 1964 S C Notes P 60 (C. No. 57) Jgmt. on 9-3-1964.

2. *Makhan Singh v. State of Punjab*, A I R 1964 S C 381.

3. *M. S. M. Sharma v. Dr. Shree Krishna Sharma*, A I R 1960 S. C. 1186.

4. A I R 1962 S C 1621 overruling A I R 1957 S C 790 vide for discussion of the decision and matters relating to Tax laws Vol III and Vol IV of this treatise.

5. *Samavanti v. State of Punjab*, A I R 1963 S C 151.

6. A I R 1960 J & K 43.

Kashmir Civil Service Rules was not followed before the order demoting the applicant, there is only a breach of the law and not breach of any fundamental right.¹

Article 33. Power of Parliament to modify the rights.

1. The Constitution does not exclude Government Servants as a class from the protection of the several rights guaranteed by the several Articles in Part III save in those cases where such persons are specifically named. Article 33 having selected the services, members of which might be deprived of the benefit of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits within which such restrictions or abrogation may take place other classes of Government servants in common with other persons and other citizens of the country cannot be excluded from the protection of the rights guaranteed by Part III, by reason merely of their being Government servants and the nature and incidents of the duties which they have to discharge in that capacity might necessarily involve restriction of certain freedoms as in Art. 19 (1) (e) and (g).²

2. The Rajasthan Government Servants and Pensioners' Conduct Rules Rr. 23, 23A were held *ultra vires* in so far as they prohibited Government servants (of Police force) from becoming members of association not recognised by Government. The rules were framed under Art. 309 for regulating the conditions of the entirety of civil servants and have no reference to the peculiar nature of the duties of the Police Officers. Art. 33 while recognising the peculiar nature of the duties of the police officers, has made provision for the abrogation and restriction of fundamental rights but the founders of the Constitution in their wisdom reserved the exercise of such power only under law to be framed by Parliament.³

Article 36.

1. Directive Principles are to be kept in view in enacting laws, though the Principles are not enforceable by Courts.⁴

Article 38.

1. The article seeks to secure social justice to citizens. For this purpose the Constitution has vested in the High Courts very wide power of judicial supervision and superintendence on all Tribunals and Courts in the State through Article 227. No external limits, fetters or restrictions have been placed on this power by the express language of the article. The Court's powers are to be exercised only according to well-recognised Judicial Principles but with restraint and caution.⁵

Article 43. Living Wage etc. to Workers

1. Though fixation of Minimum wages does interfere with the freedom of trade or business guaranteed under Art. 19 (1) (g), yet in the interests of

1. *State of J & K v. Ghulam Rasool*, A I R 1961 S C 1301 reversing A I R 1956 J & K 17.

2. *Kameshwar Prasad v. State of Bihar*, A I R 1962 S C 1166.

3. *Madan Lal Tharvi v. Deputy Inspector-General of Police Jodhpur*, A I R 1963 Raj 136.

4. *Marwa Manghani v. Sanghram Sampat*, A I R 1960 Punj 35.

5. *Marwa Manghani v. Sanghram Sampat*, A I R 1950 Punj 35; I L R (1959) Punj 1778.

the general public with a view to carry out the principles administered under Art. 43, the same is protected by clause (6) of Art. 19.¹

2. The meaning of the phrase 'unfair labour practice' cannot be restricted to the definition contained in Ss. 23 (J) and 28(K), Trade Unions Amendment Act 1947. Any practice which violates the Principle of Art. 43 and other articles declaring decent wages and living conditions for workmen which if allowed to become normal would tend to lead to industrial strife should be condemned as an unfair labour practice.²

3. Excise on cotton fabrics produced on power looms when exempted in favour of co-operative society of weavers do not violate Arts. 34, 19 (1) (f) and (g). It is in accordance with the Principle outlined in Art. 43.³

4. The provisions of the Minimum Wages Act are intended to achieve the object of doing social justice to the workmen and in construing the provisions, the Court should adopt a beneficent rule of construction. Fixing of minimum wage is protected by Art. 19 (6). Hardship to the employer is no consideration.⁴

Article 46. Educational and Economic Interests of Scheduled Castes etc.

1. In India where social and economic conditions differ from State to State, it will be idle to expect absolute uniformity of approach. For attainment of social and economic justice Art. 15 (4) authorises the making of special provisions for the advancement of the society and educationally backward classes. In this connection it is proper to remember that the States should supplement the directive policy adumbrated in Art. 46 and the preamble of the Constitution.⁵

Article 48. Organisation of Agriculture and Animal Husbandry

1. The U. P. Kans Education Act (XXII of 1951) Ss. 3, 4, 6 and 7 were held *intra vires* of Art. 19 (1) (8). It does not abridge the rights of cultivators and is quite in consonance with the Directive Principle enunciated in Art. 48.⁶

2. The directive Principles as to slaughter of cows, calves and other milch and draught cattle, are not absolute. The protection under Art. 48 is confined to cows, calves and those other animals which are presently or potentially capable of yielding milk or doing work as draught cattle but does not extend to cattle which were at one time milch or draught cattle but has ceased to be such. So, where laws are not made under one or the other directions, an executive action for establishment of slaughter house where cows may also be slaughtered, cannot be deemed *ultra vires*.⁷

1. *Gulam Ahmed Tara Saheb v. State of Bombay*, A I R 1962 Bom 97 : 63 Bom L R 323 follows A I R 1955 S C 33.

2. *Eveready Flashlight Co. v. Labour Court*, A I R 1962 All 497.

3. *Orient Weaving Mills (P) Ltd. v. Union of India*, A I R 1963 S C 98.

4. *D. M. S. Rao v. State of Kerala*, A I R 1963 Ker 115 relies on A I R 1961 S C 75 and A I R 1961 S C 849.

5. *Devadasan v. Union of India*, A I R 1964 S C 179.

6. *Deen Dayal v. State of U. P.*, 1961 All L J 370.

7. *Gadadhar Gosh v. State of W. B.*, A I R 1963 Cal 565.

1. *Chlorophyll a* (Chl *a*)

CHAPTER V

CONSTITUTIONAL PROTECTIONS

Art. 20. (1) No person shall be convicted of any offence except for a violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

FOREIGN CONSTITUTIONS

U.S.A.

Art. 9 (3) of the Constitution postulates—

“No *ex post facto* law shall be passed.” (Cf. Cl. 1 of Art. 20, India)

The Fifth Amendment to the U.S. Constitution states—

“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.” (Cf. Cl. 2 of Art. 20, India).

“No person . . . shall be compelled in any criminal case to be a witness against himself.” (Cf. Cl. 3 of Art. 20, India).

Eire

Art. 15 (5) of the 1937 Constitution says—

“The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.” (Cf. Cl. 1 of Art. 20).

Burma

Art. 24 of the 1948 Constitution states—

“No person shall be convicted of crime except for violation of a law in force at the time of the commission of the act charged as an offence nor shall he be subjected to a penalty greater than that applicable at the time of the commission of the offence.”

Japan

Art. XXXIX of the 1948 Constitution says—

“No person shall be held criminally liable for an act which was lawful at the time it was committed. (Cf. Cl. 1 of Art. 20).”

“No person shall be held criminally liable for an act . . . of which he has been acquitted nor shall he in any way be placed in double jeopardy.” (Cf. Cl. 2 of Art. 20).

"No person shall be compelled to testify against himself." (Cf. Cl. 3 of Art. 20).

Czechoslovakia

Article 35 of the 1948 Constitution of the Republic, says—

"Penalties may only be provided or imposed in virtue of the law."

Costa Rica

The 1949 Republican Constitution, Art. 34, reads—

"No law shall be given retrospective effect to the prejudice of any person or of his vested property rights or of any judicial situation."

Article 36:

"In criminal matters, no one shall be compelled to be a witness against himself, or against his spouse, parents, children or collateral relatives of blood, or marriage up to the third degree."

Article 42:

"One and the same judge shall not act as such at different stages of proceedings for the decision of one and the same point. No one shall be tried more than once for the same offence."

Government of India Act, 1935

1. No provision existed prohibiting *ex post facto* laws.

2. No provision existed *re autrefois convict* or *autrefois acquit*. But Sec. 403, Criminal Procedure Code, embodied the principle of *autrefois convict* or *autrefois acquit*.

The legislature was competent to pass *ex post facto* laws under the Act of 1935.¹ But courts were loathe to lean in favour of retrospective operation.²

United Nations

Art. 11 (2) of the United Nations Declaration of Human Rights postulates—

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than one that was applicable at the time the penal offence was committed."

I. 'EX POST FACTO' LAWS

COMMENTARY ON FOREIGN CONSTITUTIONS

U.S.A.

Art. 9 (3) of the U.S. Constitution is the corresponding provision to Art. 20 (1) of the Indian Constitution. *Ex post facto* legislation is forbidden in the U.S. Constitution in regard to both the Congress and the States. The original conception was expressed in *Calder v. Bull*³ as relating to only criminal and not civil proceedings and the classification was rendered as below. Thus *ex post facto* laws within the words and the intent of the prohibition were postulated by Justice Chase:—

1. *Chunital v. Corporation of Calcutta*, (1933) 37 C.W.N. 739.
Jnan Prasanna v. W. Bengal, A.I.R. 1949 Cal. 1.

2. *Gadai v. Emperor*, A.I.R. 1943 Pat. 361.
3. (1798) 3 Dall. 386.

- (1) "Every law that makes an action done before the passing of the law and which was innocent when done criminal and punishes such action.
- (2) Every law that aggravates a crime or makes it greater than it was when committed.
- (3) Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.
- (4) Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender."

The above four were considered as manifestly unjust and oppressive. The above definition of *ex post facto* laws was broadened in a later case, *Thompson v. Utah*,⁴ so as to include all laws which in any way operate to the detriment of the accused of a crime committed prior to the enactment of such laws.

Cooley⁵ adds two more to the above four categories:

- (5) Every law which assuming to regulate civil rights and remedies only, in effect imposes a penalty or the deprivation of a right for something which when done was lawful.
- (6) Every law which deprives persons accused of crime of some lawful protection to which they have become entitled, such as the protection of a former conviction or acquittal or proclamation of amnesty.

Cooley adds:⁶ "But so far as mere modes of procedure are concerned a party has no more right in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by courts in existence when its facts arose. The legislature may abolish courts and create new ones and it may prescribe altogether different modes of procedure in its discretion though it cannot lawfully, we think, in so doing dispense with any of those substantial protections with which the existing law surrounds the persons accused of crime."

The following were held to be not *ex post facto* laws:—

- (1) Statute authorising comparison of handwriting with any writing proved to be genuine as it was only altering the rules of evidence in existence at the time of the commission of the offence.⁷
- (2) Retroactive operation of a Federal statute with regard to impeachment of naturalization certificates fraudulently or illegally obtained.⁸
- (3) To provide for the deportation of aliens found practising prostitution after their entry into the United States even though this

4. 170 U.S. 343.

5. Cooley, 'Constitutional Law', p. 357.

6. Cooley, 'Constitutional Limitations', p. 272 (Ch. 9).

7. *Thompson v. Missouri*, 171 U.S. 380 (1898).

8. *Johannesson v. United States*, 225 U.S. 227.

provision did not exist at the time of their entry. This was so as the determination of facts upon which to base deportation is not a conviction of crime nor is deportation a punishment.⁹

- (4) Retroactive laws which may be of real advantage to the accused, *e.g.* in the matter of modification of the procedure or reducing the punishment.¹⁰
- (5) Laws which do not affect substantial right of the accused but merely change the practice.¹¹
- (6) Laws which change the place of trial¹² or take away merely technical privileges¹³ or provide longer period of incarceration between the time of conviction and execution.¹⁴
- (7) Statute permitting punishment to be enhanced on proof of a previous conviction, even though the previous conviction took place before the passing of the statute.¹⁵
- (8) Statutes¹⁶ which declare that no person after conviction of a felony shall carry on a business (*e.g.* practice of medicine) even though the person was convicted before the enactment of the law.
- (9) Law substituting electrocution for hanging.¹⁷

In *Hopt v. Utah*¹⁸ the court said: "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ipso facto* so in their application to prosecutions for crimes committed prior to their passage. For they do not attach criminality to any act previously done and which was innocent when done; nor aggravate any crime therefor committed; nor provide a greater punishment therefor than was prescribed at the time of the commission; nor do they alter the degree, or lessen the amount or measure of the proof which was made necessary to conviction when the crime was committed."

Ex post facto provision of the Constitution refers to acts of legislation only and not to their construction by the courts. In *Ross v. Origen*¹⁹ the position was reviewed thus: "Whilst thus uniformly holding that the provision is directed against legislature, but not to judicial acts, this court with like uniformity has regarded it as reaching every form in which the legislative power of the State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a bye-law, or ordinance of a municipal corporation or a regulation or some other instrumentality of the State exercising legislative authority. . . ."

In *Thompson v. Missouri*^{19a} Harlan, J., stated: "Any statutory alteration of the legal rules of evidence which would authorise conviction upon less proof in amount or degree than was required when the offence was committed, might

9. *Bugajewitz v. Adams*, 228 U.S. 585. See also *Mahler v. Eby*, 264 U.S. 32.

10. *Rooney v. N. Dakota*, (1906) 196 U.S. 319.

11. *Duncan v. Missouri*, 152, U.S. 377.

12. *Cook v. United States*, 138 U.S. 157.

13. *Commonwealth v. Hall*, 97 Mass. 570.

14. *Rooney v. N. Dakota*, (1906) 196 U.S. 319.

15. *Mcdonald v. Massachusetts*, (1901) 180 U.S. 311.

16. *Hawker v. N. Y.*, 170 U.S. 189.

17. *Makoy v. South Carolina*, (1915) 237 U.S. 180.

18. 110 U.S. 89.

19. 277 U.S. 150.

19a. 171 U.S. 380 (1898).

in respect of that offence be obnoxious to the constitutional inhibition of *ex post facto* laws. But alterations which do not increase the punishment nor change the ingredients of the offence or the ultimate facts necessary to establish guilt but leaving untouched the nature of the crime and the amount or degree of proof essential to conviction only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only in which no one can be said to have vested right and which the State on grounds of public policy may regulate at its pleasure."

In *Thompson v. Utah*²⁰ it was held that a provision of the Constitution of Utah making provision of the trial of criminal cases by a jury of eight persons was an *ex post facto* law with reference to Thompson who had been convicted under the law of the territory before Utah became a State by a jury of 12 persons and had been granted a new trial.

Australia

In Australia the principles of prohibition against *ex post facto* laws have been laid clear in some decisions. But there is no specific prohibition as such against *ex post facto* laws in the Australian Constitution. The question always turned upon whether such laws exceeded the power vested in the State incidental to the execution of the legislative, executive and judicial powers of the State covered by Placitum XXXIX in Sec. 51 of the Constitution "any power vested by this Constitution in the Government of the Commonwealth."

A regulation enacted by the executive in order to defeat a likely decision of the High Court in a pending case cannot affect a liability accruing before the promulgation.²¹

A law may modify a penalty but not punish an act in a different way.²² But a subsequent law vouchsafing to the prosecution an appeal from a new trial is not prohibited,²³ nor is subsequent modification of the laws of evidence.²⁴ Retroactive laws ought not to be used to convict a person.²⁵ The prohibition of *ex post facto* laws is in respect of criminal matters only and do not affect laws which are civil or which regulate civil remedy.²⁶ In *Winston v. State*²⁷ it was laid down that *ex post facto* laws were those enactments which came into operation after the offence was committed and which alter the situation of the accused to his disadvantage. Such laws were bad as they took away from the accused substantial rights given to him by the law in force at the time to which his guilt related. But such laws might introduce a new procedure or rules of evidence or deny certain existing privileges by imposing new condition as a prerequisite to the exercise of such privilege.²⁸ In *King v. Kidman and others*²⁹ Issac, J., stated, "An *ex post facto* Act is invalid because it is *ex post facto* and not because criminal consequences are attached but because it is retrospective, and the same fate must under the Australian Constitution attend an act which attaches civil consequences. Nor can any distinction be founded

20. (1898) 170 U.S. 343.

21. *Sendall v. Federal Commission*, 12 C.L.R. 664.

22. *Sheperd v. People*, 25 N.Y. 406.

23. *Mallatt v. North Carolina*, 181 U.S. 589.

24. *Thompson v. Missouri*, 171 U.S. 380.

25. *State v. Mallenberger*, 128 A.L.R. 1506.

26. *Farefield v. Huntington*, 22 A.L.R. 1438; See *Re. Craven*, 90 A.L.R. 973.

27. 118 A.L.R. 719.

28. *Mc Donough v. Goodcall*, 123 A.L.R. 1205.

29. (1915) 20 C.L.R. 425 H.C. See *Young v. Adams*, (1898) A.C. 469 at 470.

on the mere difference between making a past lawful act unlawful and a past unlawful act lawful." Higgins, J., in the same case opined, "It is urged however that past frauds and past conspiracies to defraud and punishment thereof are not 'matters incidental to the executive of any power' vested in the Government because they do not help the 'future' execution of such powers.

"The word 'future' is not used. Placitum XXXIX is irrespective of the time of execution, past, present or future. . . . If frauds and conspiracies to defraud which are incidental to the administration of the Government, as well as to all big financial undertakings have not been criminal and punishable before, Parliament can make them criminal and punishable whether they were committed before, or after Parliament legislates on the subject. It is admitted Parliament has powers to make retroactive laws as to specified subjects of legislation, e.g. 'naturalization', and it would need a violent straining of the wide words of the power to make laws for incidental matters if we were to read into them a prohibition of retroactive laws designed for the enforcement of substantive laws. If we did so, we should be adding to the Constitution without express words the prohibition of *ex post facto* laws, which is expressly contained in the American Constitution and omitted from ours."

Harrison More³⁰ comments on the unconstitutionality of *ex post facto* laws thiswise: "The temptation to which legislatures are liable to which American legislatures have succumbed and which American courts have met by the allegations of an invasion of judicial power, is to apply a new rule to past acts or past events, or to deal with a specific matter of injury or wrong independent of all rule. However mischievous and dangerous may be *ex post facto* laws and privileges, their very mischief lies in the fact that they are something other than judicial acts. That which should have been done in a judicial way and according to law has been done by an assumption of arbitrary power. The grant of judicial power to a special organ means that if the matter be one which from its nature is proper for judicial determination alone, the Legislature cannot deal with it otherwise or authorise any one, even a court properly constituted, to deal with it except in the way of adjudication." Thus in a question as to the penalty to be imposed for refusing to answer in an executive enquiry it must be left to a judicial body and not taken up by an executive body at all. If the latter is done and the executive assumes such power under a special law, "it is an excess of legislative power and an invasion of the judicial power, because it affects to deal with an essentially judicial matter in a non-judicial way."³¹

But a statute which changes the punishment would be *ex post facto* only if it prescribes or permits the imposition of a higher sentence³² and not when it reduces the punishment.³³ But if the law imposes an additional or increased penalty on old offenders though the old offences were committed before the statute was enacted, this is not *ex post facto* as the punishment imposed is with a view to punishing more effectively and suitably the offences committed after the enactment.³⁴

England

Parliament is supreme in England and its laws cannot be questioned by

30. In his book 'The Constitution of the Commonwealth of Australia.'

31. See *Hoke v. Henderson*, 23 American Decisions, 687.

32. *People ex Rel Pincers v. Adams*,

110, A.L.R. 1303.

33. *Sekt v. Justices Court*, 167 A.L.R. 833.

34. *A. Hawker v. New York*, 170 U.S. 189. See *Lindsey v. Wash*, 301 U.S. 397.

any authority. It can give retrospective effect to any of its laws. But jurists as Blackstone characterised this kind of legislation as most unreasonable. He said:³⁵

"There is a still more unreasonable method . . . which is called making laws *ex post facto*; when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to be a crime, and inflicts punishment upon the person who committed it." Therefore, courts in England are most reluctant to give effect to such laws unless it is very clearly and unambiguously stated so by Parliament.³⁶ In *Butchers Hide Co. v. Seacome*³⁷ it was held that "the rule of interpretation is that a new Act which penalises what otherwise is not an offence must be so construed as to make it strike at future acts or commissions, unless the legislature has clearly said so." But if Parliament expressly does make such a provision, courts are powerless not to enforce them. Thus during World War II, valid statutes were enacted increasing the penalty for offences committed before the passing of such statutes.³⁸

In the Commonwealth, the Dominions have the same powers as Parliament in England has to pass *ex post facto* laws.⁴⁰

India.

Article 20 Clause (1)

The American concept of prohibition or *ex post facto* law is adopted in the Indian Constitution though in a narrower sphere. The term '*ex post facto* law' is not ordinarily mentioned in Art. 20 Cl. (1) but catalogues two cardinal consequences which our criminal law must avoid. They are:

(1) No person shall be convicted of any offence under any law not in force at the time of the commission of the offence.

(2) No person shall be subject to a greater penalty than that which might have been inflicted under the law in force at the time of the commission of the offence.

In the Government of India Act, 1935, the sovereign power of the legislature to pass prospective as well as retrospective laws had been recognised,⁴⁰ though courts were disinclined to approve them.⁴¹ It was therefore thought very essential that in the Constitution specific prohibition against particular aspects of retrospective laws must be clearly set out. Otherwise, the sovereign power of Parliament under Art. 245 is supreme to enact any law subject only to the provisions of the Constitution. The present Article 20 contains the few limitations of that sovereign power of Parliament.

In Art. 20 (1) the prohibition is against prescribing judicial punishment with retrospective effect and levying higher penalty than permissible under existing law. Beyond these we do not have such prohibitions as—

35. 'Commentaries', Vol. I, p. 46.

36. *Moon v. Durden*, (1848) 2 Ex. 22.

37. (1941) 2 K.B. 401.

38. *Director of P.P. v. Lamb*, (1941) 2 K.B. 89. *Buckman v. Button*, 1943, 2 K.B. 405.

39. C. R. Kidman, (1915) 20 C.L.R. 425.

40. *Chunilal v. Corporation of Calcutta*, (1933) 37 C.W.N. 737.

41. *Gadai v. Emp.*, A.I.R. 1943 Pat. 361.

- (1) prohibition against change in the rules of evidence made after the commission of the offence,⁴² as that is not creating a new offence,
- (2) prohibition against change of procedure,⁴³
- (3) prohibition of any other sanction such as⁴⁴ loss or deprivation of any business or cancellation of naturalization certificate on account of any act committed prior to the operation of the Act.

Further the prohibition under this article is only against legislation and not against judicial decisions.⁴⁵

Regarding award of heavier punishments retrospectively, that is held as bad in principle. In the case of an habitual offender, to award heavier punishment by a new statute is not really *ex post facto* as the punishment is not for the act committed already prior to the Act but on account of the criminal coming under the category of an old offender which by itself is a new offence.⁴⁶ So also it is not *ex post facto* if there is only a change in the mode of execution or of the penalty without the latter being greater.⁴⁷

The word "offence" in Art. 20 must be construed in the light of Sec. 3 (38) of the General Clauses Act, 1897, where it is described as "an act or omission made punishable by any law for the time being in force." The definition is wide and is apt for construing the word in Art. 20. The definition in Sec. 40, I.P.C., where it is synonymous with "crime" is not to be the standard for purposes of Art. 20 as Art. 367 (1) directs only reference to the General Clauses Act.

The Supreme Court of India laid down in *Ras Shiv Bahadur Singh and another v. State of Vindhya Pradesh*⁴⁸ the following dicta with reference to Art. 20 (1):

- (1) This Article must be taken to prohibit all convictions or subject tions to penalty after the Constitution in respect of *ex post facto* laws whether the same was a post-Constitution or a pre-Constitution law.
- (2) What is prohibited under Article 20 is only conviction or sentence under an *ex post facto* law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence by a court different from that which had competence at the time cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no Fundamental Right to trial by a particular court or by a particular procedure, except in so far any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.
- (3) The phrase 'law in force' as used in Article 20 (1) must be understood in the natural sense as being the law in fact in existence

42. See *Calder v. Bull*, (1798) 3 Dallas 386.

43. *Thompson v. Utah*, (1898) 170 U.S. 343.

44. *Johannessen v. U.S.*, (1912) 225 U.S. 227.

45. *Ross v. Oregon*, (1913) 227 U.S.

150.

46. See *McDonald v. Massachusetts*, (1901) 180 U.S. 311.

47. *Rooney v. North Dakota*, (1905) 196 U.S. 319. *Holden v. Minnesota*, 137 U.S. 483.

48. A.I.R. 1953 S.C. 394.

and in operation at the time of the commission of the offence as distinct from the Law 'deemed' to have become operative by virtue of the power of legislature to pass retrospective laws.

In the instant case⁴⁸ as the alleged offence was committed between 9th August, 1948, the date on which the penal code was deemed to be in force in Vindhya Pradesh and 11th September, 1949, the date of the enactment of the Vindhya Pradesh Ordinance 48 of 1949, the latter was the repeal law and so, for the application of Article 20 (1) it was not the repeal and the retrospective operation of it, but it was the law already in force, namely, the Penal Code, that must be taken into consideration. In the instant case, however, the punishment was not different and so the ordinance was considered as not *ex post facto* law.

The principle underlying Article 20(1) is the same as laid down in the English case *Philipps v. Eyre*⁴⁹ and the American case *Calder v. Bull*.⁵⁰ The English case explained *ex post facto* laws as those which voided and punished what had been lawful when done and this certainly was held inequitable and unjust. But as Parliament was a supreme law-making body, the English jurisprudence did not invalidate the law itself but resorted to a compelling beneficent construction thereof where the language of the statute by any means permitted it. The American principle was clear as the laws themselves were rendered invalid by Article 1, sections 9 and 10 of the Constitution. But when comparing these with Article 20 (1) of the Indian Constitution:—

"Article 1 of the American Constitution says that 'no *ex post facto* law shall be passed . . . and no State shall pass *ex post facto* law. . . . But in Art. 20 of the Indian Constitution, the language used is in much wider terms and what is prohibited is the conviction. . . . The prohibition under the Article is not confined to the passing or the validity of the law, but extends to the conviction and is based on its character as an '*ex post facto* law'. Nor does such a construction of Article 20 result in giving retrospective operation to the Fundamental Right thereby recognized. All that it amounts to is that the future operation of the Fundamental Right declared in Article 20 may also result from acts and situations which had their commencement in the pre-Constitution period.

A statute which in its direct operation is prospective cannot be properly called retrospective statute because "a part" of the requisites for its action is drawn from a time antecedent to its passing.⁵¹ The general principle therefore that the Fundamental Rights have no retrospective operation is not in any way affected by giving the fullest effect to the wording of Article 20.

In *Kedar Nath Bajoria v. State of West Bengal*⁵² the Supreme Court had occasion to consider whether in the West Bengal Criminal Law Amendment (Special Courts) Act 21 of 1949, Sections 4 and 9 (1) offended Article 14 and Section 9 (1) violated Article 20. Their lordships, after considering the background of the legislation and its preamble, purpose and the provisions that the system of special courts to deal with the special type of offences under a shortened and simplified procedure was devised to meet the situation and that the legislation in question was based on a perfectly intelligible principle of

49. (1870) 69 B.K. at pp. 23 and 25 (D).

50. (1798) 3 Dallas 386.

51. *The Queen v. St. Mary White-chapel*, (1848) 116 E.R. 811 @ 814.

52. A.I.R. 1953 S.C. 404.

classification having a clean and reasonable relation to the object sought to be attained, held the act *intra vires* of Article 14. But the sentence of compensatory fine under Section 9 (1) was set aside as violating Article 20. While the change of procedure was quite valid enhancement of punishment was rightly illegal as *ex post facto*. The enhanced fine of Rs. 47,550 was refunded in the instant case.

The effect of clause (1) of Article 20 is the prohibition of making an act a crime for the first time and making the law retrospective. There is a further prohibition against infliction of a greater penalty than leviable under the existing law at the time when the act was committed. The clause refers only to the imposition of a penalty and hence can have no application in the case of preventive detention.⁵³

Merely because the words "No person shall be convicted" are used it does not mean that the clause (1) in Article 20 permits a law which makes an offence something which was not an offence when it was done but only prohibits the conviction for such as an offence.⁵⁴ So also a greater punishment than was originally permissible at the time of offence is prohibited. Also, a law which permits such greater punishment is also prohibited under Article 13.

Article 20 is the only restriction on retrospective laws. Otherwise both Parliament and the State legislatures have powers of legislation on retrospective subjects.⁵⁵

It will be seen that Art. 20, cl. (1) covers the first three categories of *ex post facto* laws formulated by Mr. Justice Chase in *Calder v. Bull*⁵⁶ detailed in prior pages in the Commentary on the American Law. The fourth category regarding laws affecting rules of evidence and procedure is not included in this Article. Hence under the Indian law (unlike America) there is no prohibition against rules of evidence and procedure being applied to prosecution for offences committed before they came into force.

An externment order is not a "penalty" within the meaning of Art. 20 (1). So a previously convicted person, if he later suffers externment, Art. 20 (1) is not violated.⁵⁷

The phrase "law in force" in Art. 20 must be understood in its natural sense as being the law in fact in existence and in operation as distinct from the law "deemed" to have become operative by virtue of the power of the legislature to pass retrospective laws. Art. 20 prohibits conviction under a law which is "deemed to be in force."⁵⁸

Judicial Interpretation on Art. 20 Cl. (1).

A validating Act is not necessarily hit by this Article read with Art. 13. The protection of Art. 20 is available only when some one uses the validating Act as a retrospective Act.^{58a}

*Public Prosecutor v. K. C. Ayyappan Pillai*⁵⁹ dealt with a conviction under Sec. 15 (b) of the Madras General Sales Tax Act, 19 of 1939. Before the

53. *Prahlad v. State of Bombay*, A.I.R. 1952 Bom. 1.

54. *Venkatraman v. Commr. of Police*, A.I.R. 1951 M.I. 11.

55. *Shanta Devi v. Custodian E.P.*, A.I.R. 1952 M.B. 187.

56. (1798) 3 Dallas 386.

57. *Rameshchandra v. The State*,

A.I.R. 1955 Bom. 346.

58. *In re Linga Reddy Venkata Reddy*, A.I.R. 1956 Andh. 24.

58a. *Milakhraj v. Jagdish Chandra*, A.I.R. 1957 Raj 293.

59. A.I.R. 1953 Mad. 337—1953 (1) M.L.J. 157.

amendment of the section, any violation of the Act would entail on conviction a fine of Rs. 1,000 and where the breach is a continuing one, to a further fine which may extend to Rs. 50 every day for the duration of the breach. This was omitted in the amended section. It was held that this amounted to nothing more than an alteration of procedure which did not make the act which was not an offence to be an offence or imposed a greater penalty than what was the case before. The recovery of the tax as if it were a fine does not impose a greater penalty than the two modes of recovery as an arrear of land revenue or by a suit as on a debt. In this case the statute does not prescribe a greater sentence but on the other hand has reduced it and so the prohibition of *ex post facto* does not at all arise.

The power of summary eviction given by the Amending Act of 1951 to the Madras Buildings (Lease and Rent Control) Act XXV of 1949 was held to fill only an existing lacuna in the smooth working of the provisions of the Act and was therefore not *ultra vires* of Art. 20.⁶⁰ Preventive detention was not conviction for an offence and so in such a case Art. 20 (1) cannot be invoked.⁶¹ A person was held not liable for prosecution under sec. 40 of the Calcutta Rent Ordinance, 5 of 1945 for an act of taking pugree or salami committed in 1946, as the Calcutta Rent Ordinance, 1946, which was in force when the act was committed did not make the act an offence for which a person could be prosecuted but only provided for the imposition of a penalty.⁶² Levy of greater penalty by amending the municipal law offends Art. 20.⁶³

The expression "forfeiture" in the proviso to sec. 14A of the Bihar Sales Tax Act as amended by the Bihar Finance Act IV of 1955 was held tantamount to a "penalty" within the meaning of Art. 20 (1).⁶⁴ It was also held that the section was *ultra vires* to the extent it made the imposition of forfeiture retrospective in operation. Apart from the section offending the principle of '*nulla poena sine lege*' (*ex post facto* law) the legislation offends also Art. 31 in that it is not saved by Art. 31 (5) (b) (i).

In *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*⁶⁵ the Supreme Court stated: "Article 20 (1) in its broad import has been enacted to prohibit convictions and sentences under *ex post facto* laws. This Article must be taken to prohibit all convictions or subjections to penalty after the Constitution in respect of *ex post facto* laws whether the same was a post-Constitution law or a pre-Constitution law. . . . The principle underlying such prohibition has been very elaborately discussed and pointed out in the very learned judgment of Justice Willis in the well-known case of *Philips v. Eyre* (1870) 6 Q.B.I. at pp. 23 and 25 and also by the Supreme Court of U.S.A. in *Calder v. Bull* (1798) 3 Dallas 386. In English law it is explained that *ex post facto* laws are laws which voided and punished what had been lawful when done. There can be no doubt as to the paramount importance of the principle that such *ex post facto* laws which retrospectively create offences and punish them are bad as being highly inequitable and unjust. In the English system of jurisprudence repugnance of such laws to universal notions of fairness and justice is treated as a

60. *Fathima Bi v. State of Madras*, 1952 (2) M.L.J. 767.

61. *Prahlad Krishna v. State of Bombay*, A.I.R. 1952 Bom. 1.—53 B.L.R. 717.

62. *Krishna Dutt v. Satyaranjan Bhattacharjee*, 57 C.W.N. 368.

63. *Mohari Lal v. Corporation of Calcutta*, (1953) 57 C.W.N. 243 —A.I.R. 1953 Cal. 567.

64. *Hardut Roy Moti Lal Jute Mills v. State of Bihar*, A.I.R. 1957 Pat. 1.

65. A.I.R. 1953 S.C. 394.

ground 'not' for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it. In the American system, however, such *ex post facto* laws are themselves rendered invalid by virtue of Art. 1, sections 9 and 10 of its Constitution."

The Supreme Court further pointed out in the instant case how, while the American Constitution prohibited the passing of any such *ex post facto* law, Art. 20 was not confined to the passing or validity of the law but extended to the conviction or the sentence on any such *ex post facto* law. This is to circumvent all pre-Constitution laws of any of that description. It must be noted as pointed out by the Supreme Court, "What is prohibited under Art. 20 is only the conviction or sentence under an *ex post facto* law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot *ipso facto* be held unconstitutional. A person accused of the commission of an offence has no Fundamental Right to trial by a particular court or by a particular procedure except in so far as any constitutional objection by way of discrimination or violation of any other Fundamental Right may be involved. . . . The phrase 'laws in force' as used in Art. 20 (1) must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law 'deemed' to have become operative by virtue of the power of legislature to pass retrospective laws."

Article 20 cannot by itself be deemed retrospective merely because it prohibits a conviction or imposition of a penalty after the Constitution under an *ex post facto* law passed prior to the Constitution. It therefore does not infringe the principles laid down by the Supreme Court in *Keshav Menon v. State of Bombay*.⁶⁶ All that Art. 20 stipulates is that the future operation of the Fundamental Rights set out in the Article may also in certain cases result from act and situations which had their commencement in the pre-Constitution period.⁶⁶

Art. 20 is no bar to a law relating to a continuing offence. Such an offence of a continuing nature caused by an act of a continuing nature can be punished under a law passed during the continuance of the act, though it is not punishable at the commencement of the act as an offence.⁶⁷

A law which merely changes the place of trial for an offence which operated retrospectively to offences committed prior to the passing of the law, is not void under Art. 20 (1).⁶⁸ Nor is a law void simply because it attempts to cure certain irregularities in certain awards given by an Industrial Tribunal so as to keep them alive for a certain period.⁶⁹ A law that changes procedure even for the offences committed before the law was passed is not affected by Art. 20.⁷⁰ A mere change in the manner of carrying out the sentence postulated by a new law is also *intra vires*.⁷⁰

A new law which does not enhance punishment but reduces it is not affected by Art. 20.⁷⁰ In the instant case it was held that a new provision in Sec.

66. A.I.R. 1951 S.C. 128—1951 S.C.R. 228.

67. *Abu Mohammad v. Chief Secretary, Saurashtra*, A.I.R. 1952 Sau. 98.

68. *State of Vindhya Pradesh v.*

Shiva Bahadur Singh, A.I.R. 1951 V.P. 17.

69. *C.P. Sarathy v. State of Madras*, A.I.R. 1951 Mad. 191.

70. *Public Prosecutor v. Ayyappan Pillai*, A.I.R. 1953 Mad. 337.

15 (b) of the Madras General Sales Tax Act amounted to nothing more than an alteration of procedure which did not make the act which was an offence to be an offence or imposed a greater penalty than what was the case before. The recovery of the tax as if it were a fine did not impose a greater penalty than the two modes of recovery as an arrear of land revenue or by a suit as on a debt.

In a Calcutta case⁷¹ a prosecution was launched under the Calcutta Municipality Act, 1923, but a greater penalty was levied under a later new Municipal Act. This was struck down as offending Art. 20 (1).

It was stressed in another Calcutta case⁷² that under Art. 20 no person should be convicted for any offence except for violation of a law in force at the time of the commission of the act charged as an offence. Any subsequent legislation could declare a prior act as an offence.

In *Rama Shankar v. State*⁷³ it was held that the expression 'laws in force' in Art. 20(1) meant law actually in force and not law deemed to be in force by retrospective operation of an amendment. In the instant case sections 15 and 18 of the Press (Emergency Powers) Act, 1931, became void on 26 Jan., 1950, as infringing provisions of Arts. 19 (1) (a) and 14, and as not being saved by Art. 19 (2). Hence either before or after the amendment the accused committed no offence by having in his possession the news sheets on 11 June, 1950. Even if the impugned provision were held valid by virtue of the amendment to Art. 19, the applicant could not be convicted for doing the act before the Article was amended, as there was nothing in the amendment to suggest that Art. 20 was not to apply or that a person could be convicted for violating an act that had actually become void but was later deemed not to have become void. It is a well-known principle that no greater retrospective effect should be given to an act than is warranted by its language.

In *Randhira v. State*⁷⁴ it was held that where the accused offered a bribe to a Naib Tahsildar on 16 Jan., 1950, his conviction under sec. 165A, I.P.C., by a special judge appointed under sec. 6, Criminal Law Amendment Act, 1952, was void under Art. 20 (1). Section 165A came into force only by an amendment taking effect on 28 July, 1952. There was already a substantive offence under sec. 165 for bribe-giving on the date of offence. Sec. 165A is abetment of the offence defined in sec. 165 or sec. 161, I.P.C. Hence for the act on 16 Jan., 1950, there can be no conviction for an offence created by law on 28 July, 1952.

In *State v. Narayanan*⁷⁵ it was posited that Art. 20 prohibited the creation of a new offence, the punishment of which may be prescribed with retrospective effect. The other limitation is that no one shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of offence. So if the presiding judge were to award a sentence under the Criminal Law Amendment Act, 1952, severer than that which was provided in the former law (the Indian Penal Code), then of course it would offend against Art. 20. But before that stage is reached and the trial had not completed, no reference could be made to the High Court under sec. 432, Cr.P.C., as regards the constitutionality of the Act.

71. *Mohari Lal v. Corporation of Calcutta*, A.I.R. 1953 Cal. 561.

72. *Paulin Krishna Dutt v. Satyaranjan Bhattacharjee*, A.I.R.

1953 Cal. 599.

73. A.I.R. 1954 All. 562.

74. A.I.R. 1954 M.B. 83.

75. A.I.R. 1954 M.B. 206.

In *State v. Hyder Ali*⁷⁶ it was opined that an innocent act as its inception could not become an offence by virtue of the operation of an *ex post facto* legislation. Any new law made should ordinarily affect future transactions, not past ones.

If prosecution for non-payment of octroi duty by the Municipality under a new law which though retrospective would nevertheless make a man liable for an offence for violation of a law not in force at time of offence the retrospective law is doubtless *ultra vires*.⁷⁷

While Art. 20 provides a safeguard for personal security of the subject against *ex post facto* laws, it has no application to his rights or liabilities with respect to property or contracts.⁷⁸

It is not the validating Act that is hit by this Article read with Art. 13. The protection of Art. 20 is available only when some one uses the validating Act as a retrospective Act.⁷⁹

II. DOUBLE JEOPARDY

COMMENTARY ON FOREIGN CONSTITUTIONS

U.S.A.

America.

The Rule of Double Jeopardy prohibiting any citizen to be liable for the same offence twice over is contained in the Fifth Amendment. There is this aspect of the question, namely, every citizen of the United States is also a citizen of a State territory and so he is subject to two Sovereigns and liable for punishment for breach of two sets of laws. The same act may be an offence or transgression of the laws of both and thus result in two offences. In such a case he cannot plead that the punishment by one is a bar to conviction by another.⁸⁰

Again, the same act or set of acts has been held to constitute two or more distinct offences. "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit.⁸¹ But this is different from another category, namely, acts which are punishable by two or more tribunals of two or more countries, or by two or more tribunals of the same country. The offence in such a case is a simple one but cognizable in two jurisdictions, in which event acquittal or punishment in one may be pleaded in bar to a prosecution in another court based upon the same act. In *Grafton v. United States*⁸² it was opined that the acquittal by a military court of competent jurisdiction is a bar to a second trial in a Federal Civil Court for the same offence.

Enhanced punishment to an old offender does not offend the Rule of Double Jeopardy, as being an old offender based on prior conviction is by itself a separate offence.⁸³

76. A.I.R. 1955 Hyd. 128, *vide* A.I.R. 1953 S.C. 394 Relied upon.

77. *Sreelal Modi v. Executive Officer, Sambalpur Municipality*, A.I.R. 1955 N.U.C. (Orr) 2140.

78. *Mukandi Ram v. Executive Engineer*, A.I.R. 1956 Pep. 40.

79. *Milakhraj v. Jagadish Chandra*,

A.I.R. 1957 Raj. 293.

80. *Fox v. Ohio*, 5 How., 410 *United States v. Marigold*, 9 How. 560 *Moors v. Illinois*, 14 How. 13.19.

81. *Abrecht v. U.S.A.*, 273 U.S. 1.

82. 206 U.S. 333.

83. *Graham v. West Virginia*, 224 U.S. 616.

A person can be punished for the same act in both the Federal and State courts under the National Prohibition Act and a State prohibition law, respectively. For each of these two sovereignties in determining what shall be an offence against its peace and dignity is exercising its own sovereignty and not of the other.⁸⁴

An acquittal on an indictment for murder will be a good bar to an indictment for man-slaughter and *vice versa* as in any event in the same case if he must have been guilty of one or the other as an aggravated or lesser crime.⁸⁵

By the common law jurisprudence a second punishment for the same offence is prohibited as also a second trial whether or not the accused had suffered punishment or had been convicted or acquitted.⁸⁶ Trial for purposes of the rule of Jeopardy can be said to commence when a man is charged before a competent tribunal.⁸⁷ In *Kepner's case*⁸⁷ the Supreme Court on the question whether for the Rule of Double Jeopardy to apply there should have been a former trial and a verdict by a jury, said: "The weight of authority as well as decisions of this court have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal organised and competent to try him; certainly so after committal. . . . Undoubtedly, in those jurisdictions where a trial of one accused can only be by a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach unless a jury has been called and charged with deliverance of the accused."⁸⁷

But if a jury reported disagreement and the jury was discharged, a second trial before a new jury is no bar.⁸⁸ So also no jeopardy arises if the prior prosecution was in a court not possessed with jurisdiction to try the case⁸⁹ or when the indictment is so defective that no judgment could be given on it.⁸⁹ A retrial is no jeopardy.⁹⁰ An appellate court can order a retrial for even an offence of higher degree when an accused chooses to appeal⁹⁰ from a sentence of conviction.⁹⁰ In such a case the accused is deemed to have waived the protection of Double Jeopardy. But the Government in U.S.A. cannot appeal from an order of acquittal having regard to the principles of Double Jeopardy.⁹¹ Nevertheless if the Government appeals for a higher sentence and a retrial order the rule is not offended.⁹² The same act may constitute separate offences *e.g.*, conspiracy to commit crime is different from 'the crime' which is the object of conspiracy. In such a case the rule does not apply.^{92a}

The words 'life or limb' in the Fifth Amendment embodying the Rule of Double Jeopardy, means 'any punishment'.

In a single transaction there may be two or more distinct offences as where a drunken person using rude and behaving boisterously in a public place

84. *United States v. Lanza*, 260 U.S. 377, 382.

85. *Commonwealth v. Roby*, 12 Pick (Mass.) 496. See *Statkia Crim. Pl 2nd Edn.* p. 322.

86. *Ex parte Lange*, 18 Wall. 163.

87. *Kepner v. United States*, (1904) 195 U.S. 100.

88. Citing *Coleman v. Tennessee*, 97

U.S. 509.

89. *Gerard v. People*, 4 Ill. 363.

90. *United States v. Josef*, (1824) 9 Wheaton 579.

91. *United States v. Rabinowich*, 238 U.S. 78. *Pulko v. Connecticut*, (1937) 302 U.S. 319.

92. 2 Hawke 247.

92. *Ex parte Lange*, 18 Wall. 163.

insulted a police officer. Here not only is the ordinance against drunkenness violated there is also the offence of insult to a public officer. Conviction in such a case is no bar to prosecution under the other.⁹³ But if the same set of facts will support a conviction under either of the statutes, there is no operation of the Rule of Double Jeopardy.⁹⁴ If the court that denies the sentence is illegally constituted or when the conviction is set aside in appeal and a retrial ordered no Double Jeopardy arises.⁹⁵ There is nothing to prevent the State from legislating for both civil and criminal liability in regard to the same act or omission.⁹⁶

Some cases may be cited to indicate the variety of ways in which this plea of Double Jeopardy may be invoked. In *Wade v. Hunter*⁹⁷ a soldier was tried in a court martial and after some evidence the court martial had to be dissolved because in the invasion of Germany, the army advance had so increased the distance from the residence of the witnesses that the case could not be completed within a reasonable time. Later a second court martial was constituted to continue for the purpose of securing the attendance of witnesses who were ill. In such circumstances it was held that the provision of Double Jeopardy was not violated. In *re Stubbs*,⁹⁸ where a soldier while in a military camp killed a fellow soldier and acquitted by the State court on a charge of murder, it was held that he could be tried before a court martial on a charge of disorderliness and lack of military discipline. The suspension of a naval officer for drunkenness is no bar to a court martial proceeding against the same officer under the Navy Regulation of 1865, Art. 1205. The latter Article applies to suspension from duty intended as a punishment and not suspension as a reasonable precaution for maintaining good order and discipline abroad.

The commission of a substantive offence and a conspiracy to commit it are separate and distinct crimes and a plea of Double Jeopardy is no defence to a conviction for both.⁹⁹

England

The doctrine of Double Jeopardy can be traced to the ancient maxim '*Nemo debet bis vexari pro eadem causa*' which means 'no person should be twice disturbed for the same cause'. The common law pleas of '*autrefois acquit*' (formerly acquitted) and '*autrefois convict*' (formerly convicted) arise from the same principle.

But *autrefois acquit* or *convict* pleas are a little different from the plea of Double Jeopardy, as the former connotes finality of judgment. In *Rex v. Plummar*¹ it was stated: "Where an offence has already been the subject of judicial investigation and adjudication, and there has been an acquittal, the acquittal is conclusive and it would be a dangerous principle to adopt to regard

93. *Gaviers v. United States*, (1911) 220 U.S. 338.

94. Burdwick p. 396 citing *Weymes v. Hopkins*, (1875) L.R. 10 Q.B. 378 approved in *Kepner v. U.S.A.*, (1904) 195 U.S. 100.

95. *Trono v. U.S.*, 199 U.S. 521 *United States v. Perez*, 9 Wheat 879.

96. *Helvering v. Mitchell*, 303 U.S. 391. *United States v. Hess*, 317 U.S. 537.

97. (1949) 336 U.S. 684.

98. (1905) C.C. Wash, 133 F. 1012.

99. *Victor Emanuel Pereira v. U.S.A.*, A.I.R. 1955 N.U.C. 5270. = 98 L. Edn. 329.

1. (1902) 2 K.B. 339.

a judgment of not guilty as not fully establishing the innocence of the accused." In *Rex v. Barron*² Lord Reading, C.J., made it more definite when he said: "It is against the very first principles of the Criminal Law that a man should be placed twice in jeopardy upon the same facts. The offences are practically the same though not the legal operation."

The principle of *autrefois acquit* has been applied sometimes to constructive acquittal also. In *Halstead v. Clark*³ a fresh prosecution on the same charge with the addition of word 'recklessly' was held barred as *autrefois acquit* when the court had originally refused to amend that first charge with the additional word 'recklessly' on the ground that the prosecution had failed to prove 'recklessness'. The plea of *autrefois acquit* can be raised even on an unreversed acquittal.⁴ When a retrial is ordered on merits in appeal or when the appellate court merely quashes a conviction without expressly ordering an acquittal there being no bar to a retrial, in both events the doctrine of Double Jeopardy will not avail.⁵

It may be broadly stated that a previous acquittal will be a bar to a subsequent indictment (1) if the offence charged was same in both the cases, (2) or if the same acts or omissions were the basis for the subsequent indictment and the prior acquittal. If the first indictment was such that he could be lawfully convicted therein but he was acquitted he cannot be subjected to another indictment for the same offence.⁶ The test is not whether the facts are the same or not; but the real test is if the acquittal on the first charge necessarily involves an acquittal on the second charge.⁷ On the other hand, if the crimes were so distinct that the requisite evidence varies for each of them, there is no Double Jeopardy involved.⁸ An acquittal on a charge for burglary with intent to commit larceny is no bar to a subsequent charge for larceny.⁸ Again, a soldier who was tried for murder and assault with intent to murder, was found guilty only of the former charge but acquitted on the latter charge. In such a case it was held there was no bar to a new trial on a charge for slaying the victim by man-slaughter.⁹ An acquittal on a charge of murder may be a bar for a subsequent charge for man-slaughter and *vice versa*.¹⁰ If a person is acquitted of robbery there cannot be a later action for an assault with intent to rob. Nor can an acquittal for embezzlement allow a subsequent indictment for larceny and *vice versa*.¹¹ A previous acquittal for murder is no bar to a subsequent indictment for arson which may arise on the same facts.¹² Lord Reading, C.J., put it aptly in *Rex v. Barron*.¹³ "It is quite plain that the learned judge did not intend to lay down, as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different."

Again, if an acquittal is on an insufficient indictment, there is no bar to another indictment for the same offence. This principle has been focussed in *R. v. Durury*¹⁴ thus: "Where by some defect in the record, either in the

2. (1914) 2 K.B. 570.

3. (1944) K.B. 250.

4. 2 Hale 247.

5. *Kannangra v. The King*, (1950) 55 C.W.N. 37 (40) P.C.

6. *Wemyes v. Hopkins*, (1875) 10 Q.B. 378.

7. *R. v. Barron*, (1914) 2 K.B. 570.

8. *R. v. Vendercomb*, (1796) 2 East P.C. 579.

9. *Wrublewski v. McInerney*,

(1948) C.A. 9th Cal. 166F.

10. *Holecrofts case*, (1578) 2 Hale 246.

11. *R. v. Girbutt*, (1856) D. & B. 166.

12. *R. v. Serne*, (1888) 107 Cent. Crim. 418.

13. (1914) 2 K.B. 570.

14. (1848) 3 C. & K. 193. See *R. v. Maesham*, (1912) 2 K.B. 362; See Basu's Commentary, p. 146.

indictment, the place of trial, the process or the like, accused was not lawfully liable to suffer judgment in the first indictment, he has not been in jeopardy, so as to be entitled to plead the former acquittal or conviction in bar to a subsequent indictment."

With reference to the plea of a previous conviction, that can be an effective plea only—

- (1) where the subsequent indictment was for the same exact offence as in the former case and where the former conviction was sufficient in law.¹⁵ But a conviction reversed in appeal is no bar.¹⁶
- (2) where the same acts or omissions figure in the previous conviction and the latter indictment. Thus a conviction for obtaining credit under false pretence is a bar to any later charge for larceny on the same facts.¹⁷ Also a conviction for common assault is a bar to a fresh indictment of charges (grievous harm, unlawful wounding, etc.) on which there has been no conviction.¹⁸
- (3) where the previous trial was before a court of competent jurisdiction.¹⁹ Even where the person was convicted though not sentenced or where the accused pleaded guilty but there was no sentence,²⁰ the plea is available.

India

Article 20, Clause (2)

The doctrine of Double Jeopardy is in a way conveyed by the words in Art. 20 Cl. (2): "No person shall be prosecuted and punished for the same offence more than once."

The word 'offence' must be construed in the light of the definition in the General Clauses Act, 1897, as required by the direction in Art. 367 (1). In the former Act, sec. 3 (37) [now sub-clause (38)] after the Adaptation of Laws Order, 1950, defines 'offence': "Shall mean any act or omission made punishable by any law for the time being in force." This wide definition would include criminal as well as non-criminal offences. 'Contempt of Court' comes within Art. 20 (2). The penal code definition of offence (*vide* Ss. 40, 63, 64, 65, 141, 176, 177, 201, 202, 212, 216, 441 etc.) should be eschewed for construing Art. 20 (2).

The conjunction used in Art. 20 (2) is 'and', and not the disjunction 'or' between the words 'prosecuted' and 'punished'. This connotes the essential point, that there must be both prosecution and punishment to attract the bar of Double Jeopardy. Thus if there is a discharge, there is no punishment and in a departmental enquiry there is no prosecution. In both these cases Art. 20 (2) is not applicable. As the word 'and' is correctly construed in the conjunctive sense what is a prerequisite is both prosecution and punishment. It cannot be disjunctive 'or' as that would mean the Article applies even where there is no punishment. Mere prosecution would entail the bar and this will be a much wider term than 'Trial' and such a construction is not at all proper.²¹

15. 2 Hale 215.

16. *R. v. Dury*, (1848) 3 C. & K. 193
R. v. Maesham, (1913) 2 K.B. 362.

17. *R. v. King*, (1897) 1 Q.B. 214.

18. *R. v. Grimwood*, (1986) 60 J.P.

809.

19. *Wemys v. Hopkins*, 10 Q.B. 378.

20. *R. v. Sheridan*, 26 Cr. App. R.I.

21. *Kalawati v. State of Himachal Pradesh*, (1953) S.C.J. 144.

'Prosecuted'.

The word 'prosecuted' means 'lawfully prosecuted'. So where there is no previous sanction obtained for a prosecution,²² or there is lack of jurisdiction to the court that tried the case²³ it cannot be said there has been lawful and prosecution and so a fresh trial on the same facts will not be barred. If the earlier trial was not a lawful one there could never have been any jeopardy for the accused. In such a case the rule of *autrefois acquit* is not available to the accused and therefore fresh prosecution with valid sanction is perfectly maintainable.²⁴

"Prosecuted" and "Punishment".

The word 'prosecuted' implies prosecution and punishment in a court of law and not non-judicial proceedings, e.g., departmental action against public servants, proceeding under Legal Practitioners Act etc. There is no 'prosecution' involved in preventive detention.

Trial

The words 'prosecuted' and 'punishment' imply 'a trial'. Within the meaning of Sec. 403, Cr.P.C., trial commences in a summons case when under Sec. 247 process is issued. It is immaterial whether such process is served or not.²⁵ But there is another decision of the same court which holds that trial in a summons case does not commence until the accused is brought before the court and particulars stated to him under Sec. 242.²⁶

In a warrant case trial commences after a charge is framed under Sec. 254 and the accused pleads under Sec. 254. In a sessions case, trial commences after the committal order by the enquiring magistrate after framing of a charge under Sec. 210. So whether it is a summons, warrant or sessions case, a trial commences only after some kind of hearing in a court. But a prosecution precedes in point of time 'trial' even from the inception, that is, cognizance stage by a magistrate (Ss. 195-199, Cr.P.C.) when the machinery of criminal justice is set in motion. This takes us to the inference that under Art. 20 (2) the word 'prosecution' necessarily implies that a second prosecution is prohibited even where there has been a prior dismissal of the complaint under Sec. 203 or discharge under Section 253 (1) or Sec. 259. In this connection the explanation to Sec. 403, Cr.P.C., may be examined. The fundamentals of Art. 20 (2) are that (1) there must have been a previous prosecution; (2) the accused must have been punished at such prosecution; (3) the subsequent proceedings must also be one for the prosecution and punishment of the accused; (4) proceedings on both the occasions must be in relation to the same offence. Thus this Article does not contain the principle of *autrefois acquit* which is, however, contained in Sec. 403, Cr.P.C.

Art. 20 (2) will not apply to a case where at the previous trial the accused was not sentenced but merely convicted and released on probation of good conduct under Sec. 562, Cr.P.C. The language of Sec. 562 conveys that instead of being punished, the accused may be released on entering a bond.

22. *Yusofulla v. King*, (1951) 6 D.L.R. 18 P.C. See also *Gopal-krishna v. State of M.P.*, A.I.R. 1952 Nag. 170.

23. *Sardara v. Nhoaz*, A.I.R. 1950 Lah. 40.

24. Cited in 6 D.L.R. 18 P.C. R. v.

Bowman, 6 C. and P. 337. R. v. *Bates*, (1911) I.K.B. 964. R. v. *Marshall*, (1912) 2 K.B. 362.

25. *Dudekuta*, (1917) 40 Mad. 976.

26. *Kottayya v. Venkatayya*, (1917) 40 Mad. 977.

While in such cases Art. 20 (2) will not be a bar, Sec. 403 will be a bar as it stipulates 'a conviction or acquittal'. Sec. 403 does not require a prior 'punishment' but merely a prior conviction.

The words 'prosecuted and punished' indicate that both are requisite in Art. 20 (2). They cannot be read distributively. They should co-exist.²⁷

Same Offence.

The expression 'same offence' implies offence as such and not acts which constitute offence. The bar is only for double punishment for the same offence but not different offences based on the same acts or where a separate offence flows from the consequence of one act. The limitations under the existing law come under Sec. 403, Cr.P.C., and Sec. 26 of the General Clauses Act.

Sec. 26, General Clauses Act.

This section runs:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable for the same offence."

Thus where accused is found in possession of a stolen revolver without licence there is no legal bar to his being charged and convicted for two offences Secs. 411, I.P.C., and Sec. 19 of the Arms Act.²⁸ Where an act is punishable under a special law and also under a general statute the offender can be proceeded with under either or both but cannot be punished twice for the same act. Where there is nothing in the special Act to exclude the question of the general criminal law, it cannot be inferred that there was an intention on the part of the legislature to exclude it.²⁹ Where an act for the abetment of which conviction takes place is not a separate offence under the Penal Code but is an offence exclusively under the Salt Act of 1882, Sec. 26 of the General Clauses Act is not applicable.³⁰ There can also be no two punishments for the same Act, through two enactments, e.g. conviction under Sec. 352, I.P.C., and Sec. 3 (12) of the Madras Town Nuisance Act.³¹ Where a special enactment deals with an offence similar to the offence dealt with by the general enactment it does not follow that the provisions of the general enactment are repealed to that extent. The prosecution in such a case may be under either but not both these enactments.³² Where the petitioner has been convicted for disobeying a previous notice to produce a child for vaccination, he cannot be once more convicted on the same facts under the same sub-section for failure to comply with a second notice to discontinue his breach of the previous notice.³³ Where due to the same fact an offence falls under Sec. 24 of the Cattle Trespass Act, 1871 and also under Sec. 380, I.P.C., the offender can be punished only under either of the laws and not under both.³⁴

27. *Kalawati v. Him. Pradesh State*, A.I.R. 1953 S.C. 131. *Maqbool Hussain v. State of Bombay*, A.I.R. 1953 S.C. 325.

28. *Reoti v. Emperor*, A.I.R. 1933 All. 461—1933 A.L.J. 523.

29. *Emperor v. Joti Prasad Gupta*, 53 All. 641—AIR 1932 All. 18.

30. *Mohanlal Saxena v. Emperor*, A.I.R. 1930 Oudh 497.

31. 1941 M.W.N. 765. *In re Boghial Chimanlal Nanavati*, A.I.R. 1931 Bom. 409.

32. 18 Cr. L.J. 992 42 I.C. 608.

33. *K. V. Subramanya Iyer v. Emperor*, A.I.R. 1931 Mad. 181—60 M.L.J. 299.

34. *In re Veerasami Naicker*, 1931 Mad. 18—1930 M.W.N. 529.

Section 403, Cr.P.C.

There is no provision in the Government of India Act, 1935, relating to the rule of *autrefois acquit* and *autrefois convict*. But the existing law in Sec. 403 Cr.P.C. governs the position. Chapter XXX of the code deals with it under the caption 'Previous Acquittals or Convictions':

Sec. 403. Persons once convicted or acquitted not to be tried for the same offence.

"1. A person who has once been tried by a competent court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236 or for which he might have been convicted under Section 237.

"2. A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Sec. 235, sub-section (1).

"3. A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted may be afterwards tried for such last-mentioned offence, if the consequences had not happened or were not known to the court to have happened at the time when he was convicted.

"4. A person convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for, any other offence constituted by the same acts which he may have committed if court by which he was first tried was not competent to try the offence with which he is subsequently charged.

"5 Nothing in this section shall affect the provision of Sec. 26 of the General Clauses Act, 1897, or Sec. 188 of this Code.

"Explanation.—The dismissal of a complaint, the stopping of proceeding under Sec. 249, the discharge of the accused or any entry made upon a charge under Sec. 273 is not an acquittal for the purpose of this section.

"Illustrations.—(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant or upon the same facts, with theft simply or with criminal breach of trust.

"(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery, but it appears from the facts that A committed robbery at the time when the murder was committed. He may be afterwards charged with and tried for robbery.

"(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

"(d) A is charged before the Court of Session and convicted of culpable homicide of B. A may not be tried on the same facts for the murder of B.

"(e) A is charged by a magistrate of the first class with and convicted by him of voluntarily causing hurt to B; A may not afterwards be tried for

voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

"(f) A is charged by a magistrate of the second class with and convicted by him of theft of property from the person of B. A may be subsequently charged with and tried for robbery on the same facts.

"(g) A, B and C are charged by a magistrate of the first class with and convicted by him of robbing D. A, B and C may afterwards be charged with and tried for dacoity on the same facts."

The text of Section 403 and the Illustrations coupled with Explanation, amply place the law on *autre fois acquit* and *autrefois convict* on a clear analysed list as it were. The following deductions can be enunciated from the principles laid down in the provisions covered by the section:—

A subsequent trial of an accused will be barred in the following cases only:

- (1) Where the offence subsequently charged is the same as the one previously tried.
- (2) Where the offence subsequently charged is one for which a charge might have been framed under Sec. 236 or of which accused might have been convicted under Sec. 237 at the previous trial.
- (3) Where the offence subsequently charged is one on which accused might have been convicted under Sec. 238 at the previous trial.³⁵
- (4) Where the offence subsequently charged is not distinct from the one previously tried (except in cases coming under sub-sections (3) and (4) of Sec. 403).

The above analysis is in accordance with the opinion expressed in *Gauri Shanker v. Emperor*³⁶ to the effect that the principle of *autrefois acquit* is not confined to cases falling within sub-sec. 1 of Sec. 403, and that generally no accused shall be vexed with more than one trial for offences arising out of the same set of facts.

The test to determine whether the offences charged at two trials are "distinct" for purposes of this section would be the same, *i.e.* if the offences were charged at the same trial, separate sentences could be passed in respect thereof under Sec. 71 of the Indian Penal Code.³⁷ Thus it may be stated that where the offences are constituted by the same acts or omissions they are not distinct.³⁸

- (a) A person who has been tried for an offence under Sec. 202, I.P.C., cannot be tried again on the same facts for an offence under Sec. 176, I.P.C., as the two offences are constituted by the same acts.³⁹
- (b) An acquittal under Sec. 211, I.P.C., is a bar to a subsequent trial on the same facts for an offence under Sec. 182, I.P.C.⁴⁰

35. *Government of Bombay v. Abdul Wahab*, A.I.R. 1946 Bom.

38. *In re, Chelliah Servai*, A.I.R. 1949 Mad. 195. But see *In re, Armugam* A.I.R. 1943 Mad. 737.

36. A.I.R. 1947 Pat. 290.

37. *Janikaramayya Raju v. Emperor*, A.I.R. 1934 Mad. 311—57 Mad. 554.

38. *Empress v. Ganesh Prasad*, (1889) 2 P.L.R. 66. *Janikaramayya Raju v. Emperor*, A.I.R. 1934 Mad. 311.

39. *Sharbekhan v. Emperor*, 10 C.W.N. 518.

40. *Ganapathy Bhatta v. Emperor*, 26 Mad. 308.

(c) A person tried under Sec. 353, I.P.C., cannot be tried for the same act under Sec. 186, I.P.C.⁴¹

(d) A person acquitted of the offence for disorderly behaviour under the Rangoon Police Act, S. 41 (16), cannot be tried under the penal code for rioting for the same act.⁴²

A plea of bar under Sec. 403 can be raised at any stage of the case⁴³ though the proper time is when the accused is called upon to plead.⁴⁴ It can be raised even in revision.⁴⁵

'Acquittal'.

The acquittal under Sec. 247, Cr.P.C., for complainant's absence⁴⁶ or under Sec. 494 on withdrawal of prosecution by the Public Prosecutor,⁴⁷ or under Sec. 248 on withdrawal by the complainant.⁴⁸ or when the case is lawfully compounded⁴⁹—these are acquittals within the meaning of Sec. 403.

'Conviction'.

A finding of guilty by a Magistrate under Sec. 349 is not a conviction.⁵⁰ But a committal order in which a finding of guilt is given would bar the trial of the accused for the same offence.⁵¹ Departmental punishment is not a conviction⁵² nor orders under security proceedings⁵³ or detention under a Regulation.⁵⁴

The test laid down by a Full Bench of Madras in *Rex v. John McIvor*^{54a} was whether an accused person was sought to be tried on identical facts a second time, though the offence might have been given a different label. In the light of this, the question can be posited if this is included in the prohibition under Art. 20 (2) which is only with reference to a prosecution and punishment for the same offence more than once. Further, if so, would it be a bar to a subsequent trial for a different offence on the same facts? It may, however, be stated that Art. 20 (2) does not effect any change in the existing law which appears to be more exhaustive than what is stipulated in Art. 20 (2) which must be construed as extending a special guarantee in respect only to matters covered by Art. 20 (2).

Is Sec. 403 (4), Cr.P.C., 'intra vires'?

Since, according to Art. 367, the definition of 'offence' should be that recorded in Sec. 3 (38) of the General Clauses Act, 1897, that is, "an offence shall mean an act or omission punishable by any law for the time being in

41. *Abdul Rashid v. Harish Chandra*, A.I.R. 1929 All. 940.

42. *Nga Myat Thaung v. Emperor*, A.I.R. 1935 Rang. 436.

43. *Emperor v. John McIvor*, A.I.R. 1936 Mad. 353.

44. *Ibid.*

45. *Ali Bux v. Emperor*, 1934 All. 877.

46. *Kutumbayya v. Lakshmi Narasimha Rao*, A.I.R. 1943 Mad. 6.

47. *Narasimha Mahapatra v. Emperor*, 9 Cut. L.T. 95.

48. *N. Kandasami Pillai v. Executive Officer, Panchayat Board, A.H.M.*, A.I.R. 1947 Mad. 306.

49. *Emperor v. John McIvor*, A.I.R.

1936 Mad. 353—70 M.L.J. 635 (F.B.).

50. *Emperor v. Narayanan Dhaku Bhill*, A.I.R. 1928 Bom. 240.

51. *In re, Kora Selandai*, 33 Mad. 552—A.I.R. 1914 Mad. 149.

52. *Queen Empress v. Ramnaik*, 1887 Rat. 318.

53. *Subeg Singh v. Emperor*, A.I.R. 1942 Lah. 84.

54. See *Mathai Manjaram v. State*, (1951) 6 D.L.R. Tr. Co. 277. *Queen v. Amirkhan*, 17 Suth. W.R. Cr. 15.9 Beng. L.R. 36.

54a. A.I.R. 1936 Mad. 353—70 M.L.J. 635 (F.B.)

force. So the words 'same offence' would mean the same act or omission which is made punishable under the law. This would mean that in a case where the same act or omission constitutes an offence under two statutes, the offence would be one and the same. It will not be two offences. In Sec. 403 (4), Cr.P.C., a second prosecution in respect of the same acts would be competent if the court by which he was first tried was not competent to try the offence with which he is subsequently charged. But Art. 20 (2) may bar such a second prosecution as there is no question of competency of court raised in Art. 20 (2). Similarly, unlike Sec. 403 cl. (3), Art. 20 (2) does not take into account the consequences of the accused's acts having happened or having been known to have happened at the time of his previous conviction. This is also the opinion of Mr. V. V. Chitaley⁵⁵ and we agree that Sec. 403 sub-sections (3) and (4) may as well be amended to apply only to cases of acquittal in the previous trial to satisfy constitutional requirements.

A discharge under Sec. 403, Cr.P.C. is no bar to a fresh complaint. Art. 20 (2) is no bar in such cases.^{55a}

Judicial Interpretation.

The Supreme Court of India in *Maqbool Hussain v. State of Bombay*⁵⁶ postulated that Art. 20 (2) incorporates within its scope the plea of *autrefois convict* as known in British jurisprudence or the plea of 'Double Jeopardy' as known in the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence. The words 'before a court of law or judicial tribunal' are not to be found in Art. 20 (2). But in order to invoke the protection and punishment in respect of the same offence it must be before a court of law or tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The Article contemplates proceedings of the nature of criminal proceedings before a court of law or a judicial tribunal and the proceedings in this context means an initiation or starting of proceedings of a criminal nature before such a court or tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. The Article applies to all persons and not only to citizens.⁵⁶

The test for a judicial tribunal was laid down⁵⁷ thus in *Cooper v. Wilson*:—

"A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites:—

- (1) Presentation (not necessarily orally) of their case by the parties to the dispute.
- (2) If the dispute between them is a question of fact the ascertainment of the fact by means of evidence adduced by the parties to

55. See V. V. Chitaley's Commentaries on the Constitution of India, Vol. I, pp. 495-496.

55a. *Birendra Kumar v. Ashtush Adhikari*, A.I.R. 1957 Tripura 47. See AIR 1957 All. 557.

56. (1953) 8 D.L.R. S.C. 365—AIR 1953 S.C. 325—1953 S.C.J. 456.

57. *Ibid.*, citing *Bharat Bank Ltd., Delhi v. Employees of Bharat Bank Ltd., Delhi*, A.I.R. 1950. S.C. 188—(1950) 5 D.L.R. S.C.—1950 S.C.R. 459 quoting *Cooper v. Wilson*, (1937) 2 K.B. 309 at 340.

the dispute and often with the assistance of argument by and on behalf of the parties on the evidence.

- (3) If the dispute between them is a question of law the submission of legal argument by the parties.
- (4) A decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found including, where required, a ruling upon any disputed question of law."

In the instant case^{57a} a prosecution under Sec. 23 of the Foreign Exchange Regulation Act, 1947, was held not to be barred by the prior action departmentally (tribunal) taken under Sec. 167 (8) of the Sea Customs Act. Similarly, a detainee's punishment by the Jail Superintendent under Rule 41 (1), Punjab Communists Detenue Rules, for committing jail offences is no bar to a later prosecution before a magistrate under Secs. 332, 353, 147 and 149, I.P.C.^{57a}

The Supreme Court of India postulated in *S. A. Venkat Raman v. Union of India*⁵⁸ that the roots of the principle which Art. 20 (2) enacts are to be found in the well-established rule of English law which finds expression in the maxim '*Nemo Debet Bis Vexari*'—a man must not be put twice in peril for the same offence. If a man is indicted again for the same offence in an English court, he can plead, as a complete defence, his former acquittal or conviction or, as it is technically expressed, take the plea of '*autrefois acquit*' or '*autrefois convict*'. The ambit and contents of the guarantee of the right vouchsafed in Art. 20 (2) are much narrower than those of the common law rule in England or the doctrine of 'Double Jeopardy' in the American Constitution. Art. 20 (2) does not contain the principle of '*aurefois acquit*'. The words 'prosecuted and punished' are to be taken not distributively so as to mean prosecuted or punished. Both the factors must co-exist in order that the operation of the clause may be attracted. It was further held that an enquiry under the Public Servants (Inquiries) Act is neither prosecution nor punishment. To attract Art. 20 (2) it must be in the nature of a criminal proceeding before a court of law or judicial tribunal and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but which is not required by law to try a matter judicially and on legal evidence (A.I.R. 1953 S.C. 325 followed). The words 'prosecution' and 'punishment' have no fixed connotation and they are susceptible of both a wider and a narrower meaning. But in Art. 20 (2) both the words have been used with reference to an 'offence' and the word 'offence' has to be taken in the sense in which it is used in the General Clauses Act as meaning "an act or omission made punishable by any law for the time being in force". It follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes. These are absent in an enquiry under the Public Servants (Inquiries) Act of 1850.

In *Sm. Kalawati and another v. State of Himachal Pradesh*⁵⁹ the Supreme Court explained the word 'prosecuted' thus: "If there is no punishment for the offence as a result of the prosecution sub-cl. (2) of Art. 20 has no application and secondly, an appeal against an acquittal wherever such is provided by the procedure is in substance a continuation of the prosecution."

^{57a}. See footnote 56 on previous page.

⁵⁸. A.I.R. 1954 S.C. 275.

⁵⁹. A.I.R. 1953 S.C. 181.

If the Superintendent of Jail punished a prisoner under Secs. 224 and 224[114, I.P.C., for attempting to escape from jail then a second prosecution cannot lie for the same offence.⁶⁰

In *Loomchand v. Official Liquidators, P.J. Bank Ltd.*⁶¹ a point arose whether Sec. 282A of the Companies Act provides a double punishment in that it provides for a fine not exceeding a thousand rupees and in default also a term of imprisonment not exceeding two years for the same offence. Though the wording in the section is not happy, yet in effect it is only an alternative sentence and so it was held that there was no question of double punishment or violation of Art. 20 (2).

When a conviction and sentence passed on a person after a trial are set aside on the ground of want of proper sanction, it cannot be said that there was a proper trial at all and so the result of the decision cannot operate as a bar to a fresh trial after receipt of a fresh sanction.⁶² Where the proceedings are *ab initio* void and cannot indeed even be commenced, no question of acquittal or discharge arises and it is not open to order a retrial. The quashing of the proceedings does not amount to acquittal.⁶²

Where a complaint is dismissed for default and as a result the accused is discharged or acquitted it cannot be said that the second complaint would be in contravention of Art. 20 (2) as the latter would appear to apply to a case of a prosecution ending in punishment. A discharge or acquittal on account of technical reason, such as want of sanction, must be viewed differently as no bar to a second prosecution.⁶³

A prosecution launched without a valid sanction is a nullity and Sec. 403 (1), Cr.P.C., or Art. 20 (2) of the Constitution are no bar to a fresh prosecution after getting the requisite sanction.⁶⁴

In *Paulin Krishna v. Sishupati*⁶⁵ a landlord was fined by the Rent Controller for his illegal act of not allowing the tenant to use a privy and a water tap. A subsequent prosecution in a criminal court under Sec. 41 of the Act on the same facts was held to be *ultra vires* of Art. 20 (2). The prosecution by Rent Controller is a judicial proceeding.

Preventive detention proceedings are not in the nature of a 'trial'. The showing of satisfaction against detention is not 'prosecution'. No rule of double jeopardy [Art. 20 (2)] or *autrefois acquit* (Sec. 403, Cr.P.C.) applies in cases arising under preventive detention.⁶⁶ Hence an order of detention under the Preventive Detention Act is not illegal merely because it nullifies a previous order of discharge or acquittal by a court in a criminal or quasi-criminal case.⁶⁶

In *Ranjit Singh and another v. State*⁶⁷ there is an obiter to the effect that the word 'and' between 'prosecuted' and 'punished' in Art. 20 (2) should be

60. *Prithish Dey v. The State*, A.I.R. 1952 Cal. 319.

61. 1953 (1) M.L.J. 514.

62. *M. Gopal Krishna Naidu v. State of Madhya Pradesh*, A.I.R. 1952 Nag. 170.

63. *Shri Ram Ghli and others v. Shri Ram Kishun Das*, (1951) 6

D.L.R. All. 231.

64. *In re Devanugraham*, 1952 (1) M.L.J. 550.

65. A.I.R. 1953 Cal. 85.

66. *Raman Lal Rathi v. Commissioner of Police, Calcutta*, A.I.R. 1952. Cal. 26.

67. A.I.R. 1952 H.P. 81.

interpreted disjunctively so as to mean 'or', as otherwise the provision which should be applicable to cases of acquittals also, would become inapplicable to them. This opinion is only obiter and the point was left undecided. The word *and* means only *and*. Regarding acquittals it is to be remembered that Art. 20(2) is not exhaustive and where it does not directly apply the existing law (Sec. 403, Cr.P.C., and Sec. 26, General Clauses Act) will apply.

On the question if Sec. 417, Cr.P.C., providing appeal against acquittal is *ultra vires* of Art. 20 (2) it was held:⁶⁷ "It may be that under the corresponding Fifth Amendment to the Constitution of the U.S.A. the Government has no right of appeal against an acquittal but so far as this country is concerned, not only had such a right been specifically conferred by Sec. 417 of the Code, but it has been recognized by Art. 134 of the Constitution itself in that it provides for an appeal to the Supreme Court from a judgment of the High Court reversing on appeal an order of acquittal. Nor is there any conflict . . . between Arts. 134 and 20 (2) necessitating preference being given to the latter over the former, since an accused cannot be said to have been convicted or acquitted as a result of a judgment passed in the cause of 'prosecution and punishment' if that judgment is still open to appeal to a court of higher jurisdiction. It has therefore been held under the corresponding provision of Sec. 403 of the Cr.P.C. that an appeal is not a second trial but only a continuation of the trial in the Sessions Court. . . . It follows therefore that the institution of a Government appeal against acquittal under Sec. 417 of the Code is not tantamount to the prosecution and punishment of an accused for the same offence more than once.

The view of the Nagpur High Court in *Gopalakrishna Naidu v. State of Madhya Pradesh*⁶⁸ that a literal construction of Art. 20 (2) will limit the amplitude of the rights conferred by Sec. 403 (1), Cr.P.C., is erroneous. That would give too much power to Government to launch prosecution twice over and reduce the court's power to one of absolute zero. All that is postulated in Art. 21 (2) is that a second prosecution and a second punishment for the same offence is barred. The Constitution is silent on the question of a second prosecution after an acquittal in the first instance. In such a case Sec. 403 (1), Cr.P.C., steps in. This is in line with Justice Butler's rule in *Rex v. Vendercomb and Abbot*⁶⁹ to the effect "that unless the first indictment were such as the prisoner might have been convicted upon the proof of the facts contained in the second indictment, an acquittal can be no bar to the second."

In other words, it connotes that if the second prosecution where the earlier prosecution ends in acquittal contains substantially the very same charges made in the earlier prosecution and judicially determined such prosecution is barred, but in cases where the second prosecution contains charges that have not been made in the earlier prosecution, the prior acquittal is no answer to the second prosecution.

Article 20 (2) bars a second prosecution only where the accused has been both prosecuted and punished for the same offence previously.⁷⁰ The word 'and' is used here in the ordinary conjunctive sense.⁷⁰ So the protection cannot extend to a person who was once prosecuted but acquitted.⁷¹

68. A.I.R. 1952 Nag. 170.

69. (1796) Leach c.c. 708.

70. *In re Devanugraham*, (1952) 1 M.L.J. 550. *Gopalakrishna v. State of M.P.*, A.I.R. 1952. Nag.

170. *Shri Ram v. Shri Ram*, A.I.R. 1952 All. 642.

71. See *Ranjit v. State*, A.I.R. 1952 H.P. 81.

The punishment referred to is judicial punishment,⁷² and not departmental action⁷² or punishment by jail authorities⁷³ or action under Sec. 107, Cr.P.C., for failure to furnish security⁷⁴ or punishment under the Legal Practitioners Act.⁷⁵

Adverting to the connotation of the word 'prosecuted' in Art. 20 (2) in a Calcutta case⁷⁶ it was held that the imposition of a statutory penalty (fine) by the Rent Controller under Sec. 34 of the West Bengal Premises Rent Control (Temporoy Provisions) Act, 1950, on the complaint of a tenant was 'prosecution'. Once a landlord is thus fined by the Controller, he cannot be prosecuted for the same offence before the criminal court under Sec. 40 of the Act. It is submitted that this is giving too wide a meaning to the word 'prosecution' which according to Oxford Dictionary connotes 'exhibition of a criminal charge before a court'. If 'prosecution' is not confined to what is done before courts, then a provision as Sec. 40 of W.B. Rent Control Act will be rendered nugatory. The offender who is penalised by the inferior administrative authority, will escape punishment under the general or special law by the criminal court.

An appeal cannot be termed a second trial but is only the continuation of the first trial. Hence an acquittal under Sec. 417, Cr.P.C., is not affected by Art. 20 (2).⁷⁷ Nor does a retrial make the latter trial a second trial since it is only a continuation of the prior proceeding. The mere fact the accused had suffered some days of imprisonment consequent on the first punishment and before the retrial was ordered is of no consequence whatsoever.⁷⁸ The sentence once passed since it has been set aside in appeal Art. 20 (2) can be no bar to a retrial.⁷⁹

In *Raj Narain Singh v. Atmaram Govind*⁸⁰ it was held that the resolution of a State Legislature suspending a member was not a law subject to the provisions of Art. 20 (2) or judgment of a court of justice. Such a resolution was only an expression of the opinion of the House or at best a recommendation on any particular matter. It had not the status of a law. In the instant case the action of the Speaker in having the applicant removed from the House for unruly behaviour was not a punishment. The action of the Speaker was not punitive but preventive, in the interest of order within the House. The Speaker was the sole judge of the matter and no court can interfere with his rulings in this regard. Because the applicant refused to withdraw even after the Speaker's ruling, a resolution of the House endorsing suspension of the member came about. There was no double punishment at all in this, as the action was thoroughly preventive and not punitive. Their lordships, however, opined that if it was a case of double punishment for offences as contemplated by Art. 20 (2) then they would not hesitate to enforce Art. 20 (2) even so as to override the privileges, powers and immunities of the House as Part III of the Constitution was paramount as against all branches of the State, the executive, the judiciary and the legislature.

72. *Suresh v. Himangshu*, (1951) 55 C.W.N. 605—A.I.R. 1953 Cal. 316.

73. *Prithish v. The State*, A.I.R. 1952 Cal. 319.

74. *Mathai v. State*, A.I.R. 1952 T.C. 556.

75. *In re Devanugraham* A.I.R. 1952 Mad. 725.

76. *Pulin Krishna v. Sishupati*, (1952) 56 C.W.N. 585.

77. *Ranjit v. State*, A.I.R. 1952 H.P. 81.

78. *Mithal Lal v. State*, A.I.R. 1954 All. 689.

79. *Ganesh Prasad v. State of Uttar Pradesh*, A.I.R. 1954 All. 116.

80. A.I.R. 1954 All. 319.

In *Upendra Chandra Dey v. State*⁸¹ it was posited that the word 'and' in Art. 20 (2) was definitely used in a conjunctive sense and could not possibly mean a disjunctive meaning. The Article merely recognises the principle of '*autrefois convict*' enunciated in Sec. 403, Cr.P.C. It was further held that if a trial became abortive for want of jurisdiction in the judge, there can be no bar to trial of the accused again.

It was held in *Loomchand v. Official Liquidators*⁸² that a section providing for imprisonment in the alternative in default of fine is *intra vires* of Art. 20 (2). It is only an alternative punishment and not a double punishment. Mere eviction under a rent control law is not a punishment for an offence and so if there is a criminal prosecution on the same set of facts it is not barred.⁸³ Restrictive precaution under the Madras Restriction of Habitual Offenders Act 6 of 1948 cannot come under the category of prosecution and punishment.⁸⁴ Proceedings with regard to confiscation are not prosecution and cannot therefore attract Art. 20 (2). But to be deprived of the right to possession of valuable goods may well come under the category of punishment.⁸⁵ Such cases do arise under the Sea Customs Act and other statutes of similar nature.

For application of Art. 20 (2) the prior and subsequent proceeding must be distinctly separate. An appeal is a continuation of the prior proceeding and so will not be affected by this article or Sec. 403, Cr.P.C.⁸⁶

Though the words 'before court of law or judicial tribunal' is absent in Art. 20 (2) the words 'prosecution and punishment' doubtless imply proceedings only in a duly appointed court of law or tribunal as distinct from a departmental or administrative enquiry.⁸⁷ In *Muqbool Hussain v. State of Bombay*,⁸⁷ it was postulated "that a true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites which are: (1) The presentation not necessarily orally of their case by the parties to the dispute. (2) If the dispute between them is a question of fact the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties in evidence. (3) If the dispute between them is a question of law, the submission of legal arguments by the parties and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found including where required a ruling upon any disputed question of law."⁸⁸

Applying these tests, the Supreme Court held in the instant case that the Sea Customs Authorities are not a judicial tribunal and that therefore, the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment of a court or a tribunal necessary for supplanting a plea of Double Jeopardy.

Detention under the Preventive Detention Act⁸⁹ not security proceedings⁹⁰ cannot be a prosecution for an offence. So also departmental punishment

81. A.I.R. 1954 Assam 106.

82. A.I.R. 1953 Mad. 595.

83. *Fathima Bai v. State of Madras*, A.I.R. 1953 Mad. 257.

84. *P. Armugham v. State of Madras*, A.I.R. 1953 Mad. 664.

85. *Muqbool Hussain v. State of Bombay*, A.I.R. 1953 S.C. 325.

86. *Kalawati v. Him. Pradesh State*, A.I.R. 1953 S.C. 131.

87. *Muqbool Hussain v. State of Bombay*, A.I.R. 1953 S.C. 325.

88. *Ibid. Bharat Bank Ltd. v. Employees B.B.*, A.I.R. 1950 S.C. 188. *Cooper v. Wilson*, (1937) 2 K.B. 309 followed.

89. *Raman Lal v. Commr. of Police*, A.I.R. 1952 Cal. 26.

90. *Mathai Manjuran v. State*, A.I.R. 1952 T.C. 556.

does not affect the Rule of Double Jeopardy.⁹¹ So it is in the case of disciplinary proceedings under the Legal Practitioners' Act.⁹² Though the proceedings by the Jail Superintendent under the rules framed by the Government under the Preventive Detention Act do not amount to 'prosecution'⁹³ yet punishment by the Superintendent of Prisons under the Prison Act, 1894, will count as a bar under Art. 20 (2).⁹⁴ Art. 20 (2) cannot apply to departmental proceedings and any punishment consequent thereto.⁹⁵ Repeated detention for an act for which a substantive criminal action is also taken, will not attract Art. 20(2) as there was no prosecution, nor punishment for the writer of the offending Article by mere detention.⁹⁶ A mere order for removal to another area besides a punishment imposed under Sec. 5 of the Influx From Pakistan (Control) Act 23 of 1949 does not affect the principle of Double Jeopardy. Removal is not punishment.⁹⁷

In *Shyamlal Jagnani v. State*⁹⁸ it was held that where there was a prosecution on the same facts under Sec. 353, I.P.C., as another prosecution under Sec. 26 (1) of the Bihar Sales Tax Act, Art. 20 (2) was not violated since they constituted offences by the same act but they were 'different' offences'. The trial was also not barred on the principle of '*autrefois acquit*' but was expressly permissible under Sec. 403 (4) as the Magistrate in the previous trial was not competent to try the offences in the subsequent trial in view of Sec. 26 (2) of the Bihar Sales Tax Act.

A forfeiture under the Bihar Land Encroachment Act, 31 of 1950, is not really a conviction as contemplated under Art. 20 (2).⁹⁹ Hence if a person is found to be in unlawful possession of property, he has no right to enjoy the produce of that property and the person entitled to evict him is also entitled to the usufruct.

Where sales tax was due by a partnership but instead of prosecuting the firm for non-payment one partner was prosecuted under Sec. 15 (b) of Madras Act, 9 of 1939, and acquitted, a second prosecution against the partnership represented by the two partners¹ was held *ultra vires* of Art. 20, since under Rule 19 made under Act 9 of 1939 a partner shall jointly and severally be responsible for payment of tax. Since under Sec. 403, Cr.P.C., the former partner once acquitted cannot be put up for trial, and the other partner also stands to gain the benefit by virtue of Rule 19.

Following an acquittal for a charge of breach of trust under Sec. 5 (2) of the Prevention of Corruption Act (1947), a second trial on the same facts by the Sessions Judge under Sec. 409, I.P.C., is illegal as it affects the rule of '*autrefois acquit*'.² As possession of firearm without licence is an offence independent of the offence of dacoity and as it is a case of a distinct offence, Art. 20 (2) does not bar the second trial.³

91. *Maqbool Hussain v. State of Bombay*, A.I.R. 1953 S.C. 325.

92. *In re Ram Gobind*, A.I.R. 1931 Pat. 369.

93. *Maqbool Hussain v. State of Bombay*, A.I.R. 1953 S.C. 325.

94. *Prithish Dey v. The State*, A.I.R. 1952 Cal. 319.

95. *Shiva Nandan v. State of W.B.*, A.I.R. 1954 Cal. 60.

96. *Tilok Chand v. The State*, A.I.R. 1954 Ajmere 19.

97. *Ibrahim Vazir Mavat v. State of Bombay*, A.I.R. 1954 S.C. 229.

98. A.I.R. 1954 Pat. 247.

99. *Brij Bhukan v. S.D.O., Siwan*, A.I.R. 1955 Pat. 1.

1. *State Prosecutor v. Malayappa and others*, A.I.R. 1955 N.U.C. (Mad.)—A.I.R. 1955 Mad. 161.

2. *The State v. Veereshwar Rao*, A.I.R. 1955 N.U.C. (M.B.) 3037.

3. *Ishodanand Biswas v. The State*, A.I.R. 1955 Pat. 396.

The test is whether the offences for which one is tried are distinct from those under which he has been previously tried. A prior conviction for affray (Sec. 160, I.P.C.) is no bar for a subsequent case by the injured party under Sec. 323, I.P.C.⁴

In the matter of continuing offences, the offence of failure to pay an instalment is complete the moment the accused fails to pay it on the due date. He cannot be punished again and again because he fails to pay a particular instalment in successive months, by virtue of the principle enunciated in Art. 20 (2).⁵ It is no violation of Art. 20 (2) if after a departmental punishment the Government reopens the enquiry with a view to imposing greater punishment.⁶

A plea of former jeopardy cannot be maintained where a former conviction of the accused for the same offence was based on an indictment which has been found defective such as want of proper sanction. In such a case the former prosecution was a nullity and hence it would not bar a subsequent prosecution.⁷

A discharge under Sec. 403, Cr.P.C., is no bar to a fresh complaint and Art. 20 (2) is no bar.⁸

Section 403 (1), Cr.P.C., has no application to the case, where there was only trial for several offences of some of which the accused person was acquitted while being convicted of one.⁹ Article 20 cannot apply because the accused was not prosecuted after he had already been tried and acquitted for the same offence in an earlier trial and therefore the maxim '*Nemo debet bis vexari Si constat curie quod sit pro una et eadem cause*' embodied in Art. 20 (2) cannot apply. The maxim means no man shall be twice punished, if it appears to the Court that it is for the one and the same cause.⁹ The whole basis of Sec. 403 (1) is that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal.¹⁰ In the instant case the required sanction under Sec. 6, Prevention of Corruption Act, was not obtained. The whole trial was thus null and void and there could be no bar of Sec. 403 (1) or Art. 20 (2) for a fresh trial after getting the required sanction. If a person is improperly discharged by a competent Magistrate, the remedy is revision and not harassment by successive trials before different magistrates in respect of the same cause of action.¹¹ In the case of continuing offences, previous acquittal is no bar to subsequent prosecutions till the commission of the offence is stopped.¹² In this case though the subsequent offence is of similar nature it is in fact a fresh and new offence.

Though the Collector of Customs under Sec. 167 (8) of the Sea Customs Act imposes confiscation and penalties and in that sense acts judicially, Art. 20

4. *Kariyappa v. Samanna*, A.I.R. 1955 Mys. 138.

5. *Ram Narain v. State*, A.I.R. 1956 All. 141.

6. *Mohindar Pratap Singh v. Director of Health Services*, A.I.R. 1956 Punj. 81.

7. *Dattu Pant v. Advya Chari*, A.I.R. 1956 Hyd. 127—I.L.R. (1956) Hyd. 355.

8. *Brendra Kumar v. Ashtush Adikhar*, A.I.R. 1957 Tripura

47. See A.I.R. 1957 All. 557.

9. *State of Madh. Prad. v. Veeraswar Rao*, A.I.R. 1957 S.C. 592: 1957 S.C.J. 519.

10. *Baij Nath Prasad Tripathi v. State of Bhopal*, A.I.R. 1957 S.C. 494: 1957 S.C.C. 255: 1957 S.C.J. 405.

11. *Gurcharan v. State*, A.I.R. 1957 557.

12. *G. D. Bhattar v. The State*, A.I.R. 1957 Cal. 483.

(2) is not attracted. That Article protects a person from being prosecuted and punished for the same offence more than once. Under Sec. 186, Sea Customs Act, the award of any confiscation, penalty or increased rate of duty under that Act by an officer of Customs does not prevent the infliction of any punishment to which the person affected thereby is liable under any other law,¹³ e.g. 120B, I.P.C. In order to bring it within the prohibition under Art. 20 (2), it must be established that the person was 'prosecuted' and 'punished', the latter two terms being taken not disjunctively but conjunctively. A prosecution and a punishment consequent on conviction is necessary.¹⁴ When a magistrate finds the accused guilty under Sec. 15 (b), Madras General Tax Act, 1939 and sentences the accused to pay fine in default to suffer imprisonment and further directs the sales tax due from the accused to be recovered as a fine, the latter direction does not hit Art. 20 (2). The liability of the debtor's property being attached and the amount of the sales tax being recovered as arrears of land revenue by the attachment and sale of his property cannot be regarded as amounting to a prosecution of the dealer or the assessee. It was further held in the instant case that the provision in the order, for imprisonment in default of fine cannot be regarded as amounting to double punishment.

In a recent Calcutta case,^{14a} the petitioners pleaded that their conviction under S. 426 cannot be sustained as a prosecution under S. 31 W.B. Premises Tenancy Act had been pending on the same facts. The tenant was the complainant against the landlord and his wife for cutting the electric wires merely on the ground the tenant refused to pay higher charges. It was held that the accused must point out the prior conviction to the Rent controller and await the final orders before he can seek a remedy under Art. 20 (2).

III. PROTECTION AGAINST SELF-INCRIMINATION.

COMMENTARY ON FOREIGN CONSTITUTION

U.S.A.

"No person . . . shall be compelled in any criminal case to be a witness against himself" is contained in the Fifth Amendment to the Constitution of the U.S.A. This principle is based on the old maxim '*Nemo tenetur prodere accusare—seipsum*'—no man is bound to accuse himself. The origin of this appears to be in England of the 16th Century in protest against the inquisitional methods of the Ecclesiastical courts. The common law then permitted accused to be questioned. The abuse of this practice gradually shot up the doctrine of prohibition of self-incrimination. In *Hale v. Henkel*¹⁵ the Supreme Court of America stated, "The object of the Amendment is to establish in express language and upon a firm basis that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may be compelled to testify to facts which may impair his reputation for probity or even tend to disgrace him. But the line is drawn at testimony that may expose him to prosecution. If the testimony relates to criminal acts long since past and against the prosecution of which the Statute of Limitation has run or for which defendant has already received a pardon or is guaranteed an immunity the amendment does not apply."

This right given by the Fifth Amendment extends only as a personal privilege of the witness and does not excuse him if he gave a statement incriminating

13. *Supdt., District Jail, Amritsar*, A.I.R. 1958 S.C. 119.

14. *Ramachandradu v. Gulabchand*, A.I.R. 1958 And. Prad. 707. Re-

lied on A.I.R. 1953 S.C. 325.

14a. *Brojo Lakshmi v. Sallendra Nath*, A.I.R. 1959, Cal. 260.

15. (1906) 201 U.S. 436.

minating some one else or a corporation of which he is an officer.¹⁵ He can fall back upon this privilege if as a witness he is cross-examined to reveal his incredibility and infamy.¹⁶ He may refuse to answer questions that tend to incriminate him.¹⁷ The immunity is absolute whether the statement is made in a State or a Federal court and he is saved from prosecutions in both jurisdictions.¹⁸ But he may waive his privilege; only in that event he must make a full disclosure.¹⁵ What will incriminate one is for the trial court to adjudge¹⁹ but once it is decided that a question will incriminate a party great latitude should be given to him to judge for himself of the effect of any particular question.²⁰ Where the accused is pardoned or otherwise given immunity from prosecution, he may be compelled to give evidence. Such immunity extends not only to the charge in question but also for other criminal offences that may be revealed in the evidence of the accused-witness.¹⁸ No compulsion, physical or moral, could be used to extort a communication from a witness.²¹ The protection is not merely to an accused on trial but to all persons giving testimony. The so-called 'involuntary confession' under third degree methods by the police is taboo. Voluntary confession is admissible. Only there should not be any trace of compulsion to avoid the bar of the Fifth Amendment. There was one view that this freedom from self-incrimination hampers the obtaining of truth and there is nothing to be said against an accused being subject to a calm and reasonable questioning by prosecuting officers. Justice Benjamin N. Cardozo said,²² "No doubt there remains the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry." This can be answered in the words of Osmond K. Frenkal, the lawyer who has served long in the cause of civil liberties.²³ "So long as the presumption of innocence remains a part of our legal system evidence against an accused should come from sources other than the accused himself."

It may be stated "any compulsory discovery by extorting the party's oath is contrary to principles of the free Government,²⁴ nay it is even shocking to the universal sense of justice and offensive to the common fundamental ideas of fairness and right."²⁵

The immunity offered by the Fifth Amendment is merely from giving evidence against the consent of the accused. It does not debar the prosecution from exhibiting the person of the accused to the jury, comparing his fingerprints, photographs, etc.²⁶ A corporation cannot be directed to produce its books unless there is good reason though corporation as such is an artificial person not entitled to claim the immunity of the Fifth Amendment.²⁷

The privilege against self-incrimination has been judicially enlarged in America—

16. See Burdwick, p. 338. *Brown v. Walker*, (1886) 161 U.S. 591, 598.

17. *Counselman v. Hitchcock*, (1892) 142 U.S. 547.

18. *Brown v. Walker*, (1886) 161 U.S. 591. See also *Jack v. Kansas*, 199 U.S. 372.

19. *Meson v. United States*, (1917) 244 U.S. 362.

20. *Foot v. Buchnan*, (1902) 113 Fed. 156. 161.

21. *Holt v. United States*, (1910) 211 U.S. 245, 252.

22. *Palko v. Connecticut*, (1937) 302 U.S. 319, 325.

23. Osmond K. Frenkal: 'Our Civil Liberties', p. 148.

24. *Boyd v. United States*, (1886) 116 U.S. 616.

25. *Betts v. Brady*, 316 U.S. 455.

26. *Holt v. United States*, (1910) 218 U.S. 245.

27. *Hale v. Henkel*, (1906) 220 U.S. 201.

- (1) to include oral as well as documentary evidence.²⁸ But among the latter only private papers are immune²⁹ and not public papers.³⁰
- (2) to include a witness as well as a party defendant.³¹
- (3) to include civil and criminal proceedings though the Fifth Amendment refers to only a 'criminal case'. The privilege extends 'wherever the answer might tend to subject to criminal responsibility him who gives it.'³¹

Willoughby states³² that "the immunity of the Fifth Amendment is no bar to the use in a subsequent prosecution of evidence that has been voluntarily given by the accused; nor does it prevent the courts from compelling testimony by statute; subsequent use of evidence so obtained in criminal actions has been forbidden. Thus also the immunity does not relate to evidence the tendency of which is merely to discredit the moral character of the witness."

But the immunity is not necessary in cases as *Hale v. Henkel*³³ where it was postulated, "If the testimony relates to acts long since past and against the prosecution of which the statute of limitations has run or for which he has already received a pardon, or is guaranteed an immunity the amendment does not apply. . . . The criminality provided against is a present not a past criminality, which lingers only as a memory and involves no present danger of prosecution."

Though *Boyd v. United States*³⁴ held that the right of the individual to immunity from compulsory self-incrimination includes the right to refuse to produce books and papers which would have or tend to have the effect of incriminating himself, yet *In re Harris*³⁴ it was held that the principle did not invalidate a law compelling bankrupts to surrender books and papers. This was based on the principle that the law requires a bankrupt to surrender his property. The books and papers of a business are a part of the bankrupt estate (Sec. 70, Bankruptcy Act, 1898). To permit him to retain possession, because surrender might involve disclosure of a crime would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property.³⁵ But when a bankrupt appears as a witness before a commissioner he like any other witness, can assert his constitutional right to immunity from self-incrimination.

All that the Fifth Amendment guarantees is freedom from compulsion. So an accused may voluntarily elect to give evidence. But if he elects not to give such evidence this fact cannot be used against him to his prejudice.³⁶

Searches and Seizures

This freedom from self-immolation is closely connected with the guarantee in the Fourth Amendment which protects the citizen from unreasonable searches and seizures "except upon probable cause, supported by oath or affirmation with particulars describing the place to be searched and the person or thing to

28. See footnote 24 above.

29. *U.S. v. White*, (1944) 322 U.S. 694.

30. *Wilson v. United States*, 149 U.S. 60.

31. *McCarthy v. Arndstein*, 266 U.S. 34.

32. Willoughby: p. 476, Student Edi-

tion (1938).

33. 201 U.S. 43. 67.

34. 221 U.S. 274. See also *Johnson v. United States*, 228 U.S. 457.

35. *McCarthy v. Arndstein*, 266 U.S. 34. 41.

36. *Wilson v. United States*, 149 U.S. 60.

be seized". In *Boyd v. United States*³⁷ it was stated, "The tendency of those who execute the criminal laws of this country to obtain convictions by means of unlawful seizures and enforced confessions, the latter often obtained subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution."

The immunity against illegal searches has often been stressed. Thus sealed mail matter may not be opened except on a search warrant.³⁸

The Fourth Amendment which guarantees persons against 'unreasonable searches and seizures' has often been clubbed with the principles laid down by the Fifth Amendment against self-incrimination. Thus to seize a man's private papers was prohibited as that would in effect be making him a witness against himself. It was held equally unconstitutional to compel him to produce such papers by *subpoena duces tecum*.

When executing search warrant for gambling devices, other papers of the defendant were seized and used as evidence to connect him with the illegal gambling transaction. It was held such evidence was not contrary to the Fourth and Fifth Amendments³⁹ as the evidence was pertinent to the issue and the manner of seizure might not be very germane in that connection. But the Adam's case was distinguished in *Weeks v. United States*⁴⁰ on the ground that there was at any rate a search warrant in the former and the accused could have asked for the return of the extra papers seized. In the latter case the seizure was without any warrant and so totally void and the request for return of the incriminating papers was quite valid. In *Burdeau v. McDowell*⁴¹ a third party stole the incriminating papers and passed it on to an officer and in this case no right vested with accused to ask for return of the papers from the Government, though he might ask for it if it was with the thief. But the dissenting judges Brandies and Holmes said, "Respect for law will not be advanced by a resort in his enforcement to means which shock the common man's sense of decency and fair play."

A witness before a Congressional committee confessed to having run a gambling house. A conviction based on this confession was held *ultra vires* as it was based on self-incriminating testimony compelled by a summons.⁴²

England

The cardinal principle of criminal law which is really the bed-rock of English jurisprudence is that accused must be presumed to be innocent till the contrary is proved. It is the prosecution that must prove the offence. The accused need not make an admission or statement against his own free will. He can stand by and see what case has been made out against him. This presumption of innocence gave rise to the rule of immunity from self-incriminating evidence. The Criminal Evidence Act, 1898, makes the accused a competent witness on his own behalf but there is no compulsion about it. It is his choice to examine himself or not. If examined, his evidence may be commented upon by the prosecution. But failure to give evidence cannot be commented upon. In India there is no provision which makes the accused

37. (1886) 116 U.S. 616,

38. *Ex parte Jackson*, (1877) 96 U.S. 727.

39. *Adams v. New York*, (1904) 192 U.S. 585.

40. *Weeks v. United States*, (1914)

232 U.S. 383.

41. (1921) 41 Sup. Court Rep. 574.

42. *William Adams v. State of Maryland*, (1954) 98 Law Edn. 608.

to examine himself as a witness. This enables the accused not to fall a victim to the glamour of examining himself and probably spoiling his case.

In the matter of searches, in *Ellias v. Pasmore*,⁴³ it was held that the police were empowered to execute a warrant for arrest and search a person whom they had lawfully arrested, and were also empowered to search the premises where the arrest was made and seize materials which were relevant to the prosecution of any crime committed by any person, not merely the prisoner himself. But in *Entick v. Carrington*,⁴⁴ an earlier case, such wide powers to the police was discountenanced. *Elias v. Pasmore* is open to question and it will be more in keeping with constitutional tradition that if the police need extensive powers in certain kinds of cases, they should be granted and defined by Parliament. In such searches if incriminating papers are seized, the accused need not necessarily explain or make any statement incriminating himself.

India

Article 20 (3)

The doctrine of immunity against self-incriminatory statements is expressed in Art. 20 (3) as: "No person accused of an offence shall be compelled to be a witness against himself."

"Accused of an Offence"

1. The doctrine is thus narrower in India than in the U.S.A. The guarantee of immunity is limited to those 'accused of an offence' and does not apply to witnesses nor to civil proceedings. The American Fifth Amendment though it refers to a criminal case has been held to be applicable to "both civil and criminal proceedings whenever the answer might tend to subject the citizens to criminal responsibility him who gives it."⁴⁵ In England both the accused and the witness in any proceeding are protected from answering questions which may result in criminal prosecution or any other penalty or forfeiture.⁴⁶ But in India there is no such protection guaranteed to a mere witness. But Art. 20 (3) leaves untouched the existing law regarding witnesses in India.

Thus Sec. 132 of the Indian Evidence Act, 1872, provides that "a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding upon the ground that the answer to such question will criminate or may tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind." There is a proviso that "no answer which a witness shall be compelled to give, shall subject him to any arrest, or prosecution or proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer."

2. The term 'accused of an offence' connotes necessarily a proceeding in a criminal court under the Criminal Procedure Code for an act punishable under the Indian Penal Code or any special or local law.⁴⁷ It will thus include cases of contempt under the Contempt of Courts Act. The American law confines the Fifth Amendment to a 'criminal case' and therefore cases of contempt may not be covered by the amendment. The court may dismiss the complaint under Sec. 203, Cr.P.C., or it may issue process to the accused after

43. (1942) 2 K.B. 164.

44. 19 St. Tr. 1067.

45. *McCarthy v. Arndstein*, 246 U.S. 34. 40.

46. Best: 'Evidence,' art. 125; Taylor,

1453.

47. *Vide* Definition of 'offence' in the General Clauses Act and the Indian Penal Code.

taking the case on file. Only after process is issued does the offender mentioned in the complaint become an accused. So 'accused of an offence' means an accused facing a trial.⁴⁸

3. We noticed that the American law of prohibition of self-incrimination extended not only to oral evidence but also documentary evidence. In India according to existing law Sec. 3 (1) of the Evidence Act postulates that evidence means and includes "all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry"—such statements are called oral evidence. But Sec. 3 (2) states that all documents produced for inspection of the court are called documentary evidence. Art. 20 (2) speaks of a prohibition of an accused from being compelled to be a *witness* against himself. 'Witness' is circumscribed to the category in Sec. 3 (1) of the Evidence Act. Therefore, Art. 20 (2) does not appear to extend to 'documentary evidence'. Under Sec. 139 of the Evidence Act a person summoned to produce a document is not a witness. He cannot be cross-examined. So mere production is not summoning as a witness. This is quite in consonance with the prevailing law, as under Sec. 94, Cr.P.C., any person (including accused) may be summoned to produce a document. Any accused who refuses to obey such court summons, commits contempt of court actionable under Sec. 485, Cr.P.C., apart from the possibility of an adverse inference drawn from such non-production. The American extension of privilege to the private and personal papers of an accused is therefore absent in India. Under Sec. 96, Cr.P.C., even the premises of an accused may be searched by warrant for any document essential for his conviction. In America, on the other hand, we have in the Fifth Amendment "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches." In India search of the house of an accused for articles is permissible.⁴⁹ In England we have already noted the latest trend towards more police power in the matter of searches indicated in *Elias v. Pasmore*.⁵⁰ As it is, in Art. 20 (2) there is no protection against unreasonable searches which therefore must be left to be considered by the legislature. Secs. 51 and 54, Cr.P.C., enable searches of the person of the accused. This is not making accused a witness. In *Satyakurkar v. Nikhil Chandra*,⁵¹ it was held that Secs. 94 and 96, Cr.P.C., applied to the case of an accused on trial. The word 'person' in Sec. 94 includes an accused person. Sec. 94, Cr.P.C., merely compels a person to produce a document. What use will be made of the document and how it will be proved are not matters which the accused can be compelled to assist. So Sec. 94 is not really *ultra vires* of Art. 20 (3) which only restates the already existing law and does not create a new fundamental right. The document may prejudice the accused later but it does not prejudice by reason of the accused being compelled to give evidence against himself as required under Art. 20 (3).

4. The law relating to approvers contained in Secs. 337 and 339, Cr.P.C., dealing with tender of pardon is not affected by Art. 20 (2) as the prohibition is only against the accused being 'compelled'. The accused has every right to waive this privilege and make a voluntary confession in lieu of pardon. Once he accepts a tender of pardon a full disclosure of all facts relating to the crime is demandable from him. If he fails to do this he may, under Sec.

48. *Md. Yusuf*, (1931) 58 Cal. 1214; A.I.R. 1931 Cal. 341.

49. *Pareesh Chandra v. Jogendra*, A.I.R. 1927 Cal. 93. *Suref Konda*

Reddi v. Emperor, A.I.R. 1951 Mad. 17.

50. (1934) 2 K.B. 154.

51. A.I.R. 1951 Cal. 101.

339, Cr.P.C., be proceeded with for the original offence or any other offence made out.

5. There is no bar to an accused against giving evidence against another accused separately tried. There is neither any prohibition against the prosecution comparing the finger-prints of the accused or on the court asking the accused to make a foot-print or to exhibit himself in a particular dress as in all such cases the accused is not giving testimony but is only exhibiting facts.⁵² The words 'against himself' in Art. 20 shows that the bar of being a witness is only against himself. In the phrase 'compelled to be a witness against himself' these words obviously permit the accused to make a statement incriminating a third person. It does not matter if the accused is himself the agent of such third person.⁵³ The word 'person' does not obviously include a corporation.⁵³

6. 'Coerced confession' in India comes under the ordinary law—Sec. 164 (3) of Cr.P.C.—which enjoins that a confession cannot be recorded unless it is voluntary. There can be no conviction on an illegal coerced confession.⁵⁴ Art. 20 (2) provides no immunity on this aspect as what Art. 21 stipulates is that no one shall be deprived of his life or liberty except by procedure established by law. Sec. 164 (3), Cr.P.C., comes under the category of 'procedure established by law.' In America conviction upon coerced confession has been held to be repugnant to the guarantee of due process.⁵⁵ But in India there is no constitutional guarantee of 'due process'. Immunity against 'extorted confession' does not necessarily flow from the rule of 'self-incriminating evidence', though it is an analogous subject. It is, therefore, left to be dealt with by existing ordinary law.

7. *As to applicability of Art. 20 (3) to military personnel vide Art. 33.*

In a recent American case⁵⁶ it was held that a conviction by a trial court which had admitted coerced confessions deprived a defendant of liberty without due process. A Supreme Court rule has been adopted by the American Federal Courts that denies admission of confessions obtained before prompt arraignment notwithstanding their voluntary character.

Judicial Interpretation

Art. 20 (3) speaks of 'accused of an offence' implying a criminal offence. So the examination of a company director under Sec. 45G of the Banking Companies Act so as to exculpate him from any charges made or suggested is not a criminal proceeding.⁵⁷

A magistrate offends Art. 20 (3) if he orders notice to accused person to produce in court the document impugned as forgery,⁵⁸ or if he directs the accused to give in court thumb impression for comparison.⁵⁹ But if the

52. See Willis: 'Constitutional Law', p. 522. *Holt v. United States*, 218 U.S. 245.

53. *Hale v. Henkel*, (1906) 201 U.S. 43 (66).

54. *Purnananda v. Emperor*, A.I.R. 1939 Cal. 65; *Mohsena Khatun* 43 C.W.N. 893; *Baldeo v. Emperor*, A.I.R. 1947. Pat. 281.

55. *Chambers v. Florida*, 309 U.S. 227. *Ashcroft v. Tennessee*, (1944) 322 U.S. 143.

56. *Clyde Brown v. Robert A. Allen* (Supreme Court U.S.A. dated 9-2-1953), A.I.R. 1955 N.U.C. 1687: 344 U.S. 443: 97 Law. Ed. 469.

57. *In re Central Calcutta Bank Ltd.*, 61 C.W.N. 709. See A.I.R. 1957 Cal. 521.

58. *Krishna Kesavan v. State of Kerala*, A.I.R. 1957 Kerala 78.

59. *Bhrij Bhusan v. State*, 1957 M.P.C. 274: 1957 M.P.L.J. 347.

element of coercion or compulsion is absent and if the accused voluntarily offers his thumb impression there is no invasion of a fundamental right at all.⁵⁹

Taking of thumb impression while under arrest for comparison is taboo under Art. 20 (3).⁶⁰ But examination of medical doctor of the accused under arrest and observing the patient's symptoms is not compelled testimony. They are merely observations on the person of the accused.⁶⁰

Testimony derived through resort to Sec. 27 of the Evidence Act is not hit by Art. 20 (3) so long as it is voluntary and not obtained by compulsion or force.⁶¹ Even if an accused affixes his thumb impression for comparison without compulsion it is *intra vires* of Art. 20 (3).⁶²

Vis-a-vis retracted confessions the Supreme Court of India has held in *Kalawati and another v. State of Himachal Pradesh*,⁶³ that sub-cl. (3) of Art. 20 does not at all apply to a case where the confession is made without any inducement, threat or promise. It is true that a retracted confession has only little value as basis for a conviction and that the confession of one accused is not evidence against a co-accused tried jointly for the same offence but can only be taken into consideration against him, but this deals with its probative value and has nothing to do with any repugnancy to the Constitution. So using a retracted confession against an accused does not violate Art. 20 (3) as such.

In *M. P. Sharma v. Satish Chandra, District Magistrate*,⁶⁴ the Supreme Court posited that searches made in pursuance of warrant issued under Sec. 96, Cr.P.C., could not be challenged as illegal as offending Art. 20 (3). There is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Art. 20 (3). But a search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another, to which he is obliged to submit and are therefore not his testimonial acts in any sense. A power of search and seizure is in any system of jurisprudence an overriding power of the state for the protection of social security and the power is necessarily regulated by law. When the constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment there is no justification to import it into a totally different fundamental right by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Art. 20 (3) would be defeated by the statutory provision for searches. Except in the limited class of cases falling under Sec. 165, Cr.P.C., issue of a search warrant is normally the judicial function of a magistrate. When such judicial function is interposed between the individual and the officer's authority for search no circumvention thereby of the fundamental right is to be assumed. In the present set-up of the magistracy in this country, their Lordships of the Supreme Court opined, it

60. *In re Palami Goundan*, A.I.R. 1957 Mad. 546.

61. *In re Mudugalah Jeremiah*, A.I.R. 1957 And. Pr. 61.

62. *Gulam Nabi v. State*, A.I.R. 1957 K. & J. relying on A.I.R. 1957

Mad. 67 and 1955 All. 367 Dis-sents from A.I.R. 1956 Mad. 632.

63. A.I.R. 1953 S.C. 31.

64. A.I.R. 1953 S.C. 300.

was not infrequently that the exercise of this judicial function was liable to serious error but the existence of scope for such occasional error is no ground to assume circumvention of constitutional guarantee.

Their Lordships further added that even assuming Sec. 94, Cr.P.C., was applicable to an accused and also that there was an element of compulsion implicit in the process contemplated by Sec. 94. Sections 94 and 96 (1), Cr.P.C., could not be read as imparting any statutory recognition of a theory that search and seizure of documents was compelled production thereof. Section 96 (1) has three alternatives and the requirements of previous notice or summons and the non-compliance is prescribed only for the first alternative and not for the second or the third. A "general search and a search for a document or a thing not known to be in possession of any particular person" are not conditioned by any such requirement. Indeed in cases covered by the second alternative such a requirement cannot even be contemplated as possible. It would therefore follow that some at least of the searches within the scope of the second and third alternatives in Sec. 96 (1) would fall outside the constitutional protection of Art. 20 (3)—an anomalous distinction for which no justification can be found on principle.

In a recent Allahabad case,⁶⁵ it was posited that if accused was compelled to produce incriminating evidence in a murder case, that would be quite inadmissible. But where there was no proof of such compulsion no presumption could be drawn against such evidence.

The Supreme Court reiterated the principle that the accused could not be compelled to be a witness against himself in *Sharma v. Satish Chandra*.⁶⁶ It was also pointed out therein that searches made under Sec. 94, Cr.P.C., were *intra vires* as it was always deemed to be an overriding power of the State for the protection of social security.

A direction under Sec. 73 of the Evidence Act to take specimen writings of accused does not contravene Art. 20 (3).⁶⁷

Where an accused surrendered before the sub-magistrate stating he was wanted by the police in connection with his wife's murder and the magistrate found his dhoti and upper cloth blood-stained and he had besides a blood-stained weapon, any direction by the court to his clerk and peon to seize these blood-stained articles is not *ultra vires* of Art. 20 (3). There was in this case no compulsion exercised upon the accused to produce the article and be a witness against himself in the murder case.⁶⁸ When there is a *bona fide* discovery of property or facts in pursuance of a statement made by accused, the police could not be indicted for having compelled it. The presumption is always in favour of voluntariness⁶⁹ under Sec. 27 of the Evidence Act.

Though Art. 20 (3) appears to preclude a court from issuing summons to an accused person to produce any document or thing in his custody, there is nothing in Art. 20, to prohibit the police from searching either the premises or the person of the accused in the manner laid down in the Criminal Procedure Code nor is the magistrate's power of issuing a search warrant abrogated by

65. *Sunder Singh v. The State*, A.I.R. 1955 All. 367.

66. A.I.R. 1954 S.C. 300 (S.C.): 1954 S.C.J. 428.

67. *Sailendra Nath Sinha v. The State*, A.I.R. 1955 Cal. 247.

68. *In re Palani Moopan*, A.I.R. 1955 Mad. 495. Distinguishing A.I.R. 1954 S.C. 300.

69. *Jethiya v. The State*, A.I.R. 1955 Raj. 147.

the Constitution.⁷⁰ In a Madras case,⁷¹ Somasundaram, J., felt that a notice to an accused to show cause against search of his premises for certain incriminating documents was an indirect way of compelling an accused to produce and that the notice was therefore *ultra vires* of Art. 20 (3). But Balakrishnayyar, J., in another case⁷⁰ felt that this position was not quite unassailable. The question posed was whether a warrant if it could not be issued after notice, could it be issued *ex parte*? His Lordship, however, felt that a compromise between the security of the public and the liberty of the individual involved in prohibiting the issue of summons only and not a warrant. It is submitted the logic is not clear at all.

Another Madras case⁷² posited clearly that the guarantee in Art. 20 (3) did extend to any compulsory process of production of evidentiary documents which were reasonably likely to support a prosecution against the accused.⁷²

In *Satya Kinkar v. Nikhil*,⁷³ it was posited that Art. 20 (3) did not create any new right but simply repeated what was the law before the Constitution, namely that the accused could not be compelled to be a witness against himself. In the Indian law an accused cannot examine himself as a witness. No oath could be administered to him. Sec. 342 (4) prohibits it. Section 5 of the Indian Oaths Act, 1873, compels administration of oaths to witness but the accused in a criminal proceeding are not to be administered oath at all per Sec. 5. Therefore an accused cannot be a witness at all. Art. 20 (3) merely restates this position as a guarantee eto an accused not to be compelled to be a witness against himself. But Art. 20 (3) does not prohibit voluntary evidence by an accused. For an accused to do this must be so allowed by the ordinary law of the land by an amendment to Sec. 342 and the Indian Oaths Act. We have seen how in England and America an accused can examine himself as a witness in his own defence. The Supreme Court of America has also held in *Wilson v. U.S.A.*,⁷⁴ that the accused's failure to exercise the option of examining himself as a witness must not give rise to a presumption against him. If such a presumption is drawn it will virtually amount to compelling an accused to examine himself.

In *State v. Padmakant Malviya*⁷⁵ it has been posited that contempt of court is not an offence within the meaning of Sec. 5 (2), Cr.P.C. The alleged contemner is also not an accused person within the meaning of Sec. 5 of the Indian Oaths Act, 1873. An alleged contemner is also not a person accused of an offence within the meaning of Art. 20 (3) of the Constitution and so if he has voluntarily filed an affidavit he can be cross-examined on it.

The thumb impression of the accused taken by the police on a slip of paper which was later produced in court cannot amount to testimonial compulsion affected by Art. 20 (3).⁷⁶

70. *In re Sornalingam Chettiar*, A.I.R. 1955 Mad. 685.

71. *Sornalingam Chettiar v. Asst. Commr. of Labour, Karaikudi*, A.I.R. 1955 Mad. 716.

72. *Swarnalingam Chettiar v. Asst. Labour Inspector*, A.I.R. 1956 Mad. 165, following A.I.R. 1954 S.C. 300.

73. A.I.R. 1951 Cal. 101 (F.B.). Note. After the Amended Cri-

iminal Procedure Code of 1955, an accused can examine himself as a witness.

74. (1893) 149 U.S. 60: 37 Law Ed. 650.

75. Cf. A.I.R. 1954 All. 523. A.I.R. 1945 All. 1. 1945 Oudh S. 26 commented. A.I.R. 1944 Bom. 127 relied on.

76. *Sheikh Mohammad Hussain v. State*, (1956) 2 M.L.J. 427.

Having regard to the historical background regarding the Indian criminal procedural law regarding searches, interposition of the judicial function while ordering searches and the person to whom the orders regarding searches are addressed, searches are not tantamount to testimonial compulsion to the accused persons so as to offend Art. 20 (3).⁷⁷

To arrest an accused on information of an alleged murder and then subject him to rough treatment so as to get from him a lead for the discovery of the dead body is hit by Art. 20 (3).⁷⁸ So long as the testimonial compulsion is the outcome of compulsion of the accused, the bar extends to any person who deposes in court. It does not matter if it is the accused or any-body else who testifies to it in court.⁷⁹

The doctrine of immunity from self-immolation is founded on the presumption of innocence which characterises the English system of criminal justice in contradistinction to the inquisitorial procedure obtained in France and some other continental countries. It is for the prosecution to prove the guilt of the accused and the latter need not make any statement if he does not want to. But the rule in Art. 20 (3) is narrower than the Anglo-American rules since the privilege is confined to persons accused of an offence. Witnesses in India are left untouched and continue to be governed by Sec. 132 and other provisions of the Evidence Act.⁷⁹

A magistrate offends Art. 20 (3) if he orders notice to accused person to produce in court the document impugned as forgery⁸⁰ or if he directs accused to give in court his thumb impression for comparison.⁸¹ But if the element of coercion or compulsion is absent, and if the accused voluntarily offers his thumb impression, there is no invasion of a fundamental right at all.⁸²

Art. 20 (3) speaks of 'accused of an offence' implying a criminal offence. So the examination of a company director under Sec. 45G of the Banking Companies Act so as to "exculpate him from any charges made or suggested" is not a criminal proceeding.⁸³ The award of costs alone appears to be the objective therein.

Taking of thumb impression while under arrest for comparison is hit by Art. 20 (3). But examination of the doctor of the person of the accused and noting down symptoms thereon is not compelled testimony.⁸⁴

Article 20 (3) confers a privilege. It is well settled that a privilege can always be waived.⁸⁵ It may be waived by voluntary answering questions, or by voluntarily taking stand in the witness-box or by failure to claim privilege. Hence when a person against whom a criminal complaint was instituted, on being summoned as witness in the preliminary enquiry under Sec. 202, Cr.P.C., appeared and gave evidence the privilege under Art. 20 (3) is deemed waived. But since there was no written request by them, and under Sec. 342-A

77. *Mohammad Hussain v. Provident Fund Inspector*, A.I.R. 1957. Madh. B. 68 relying on A.I.R. 1954 S.C. 300 and A.I.R. 1955 M. 635.

78. *Dhoom Singh v. The State*, A.I.R. 1957 All. 197.

79. *Subedar v. State*, A.I.R. 1957 All. 396. Following A.I.R. 1954 S.C. 300 and 1954 (1) M.L.J. 680.

80. *Krishna Kesavan v. State of*

Kerala, A.I.R. 1957 Kerala 78.

81. *Bhrij Bhusan v. State*, 1957 M.P.C. 274: 1957 M.P.L.J. 347.

82. *Bhaluka Behera v. State*, A.I.R. 1957 Orissa 172.

83. *In re Central Calcutta Bank Ltd.*, 61 C.W.N. 709: See A.I.R. 1957 Cal. 521.

84. *In re Palini Govindan*, A.I.R. 1957 Mad. 546.

85. *Subedar v. State*, A.I.R. 1957 All. 396.

Cr.P.C. they could appear only as witnesses for the defence, and never for the prosecution, whatever statements had been obtained from them could not be used.⁸⁵ The protection is available under Art. 20 (3) to an accused as soon as he is named as an accused either in the First Information Report or in a complaint instituted against him in Court.⁸⁵ The Art. 20 (3) consists of three components. (1) It is a right pertaining to person accused of an offence, (2) it is a protection against compulsion to be a witness, (3) it is a protection against such compulsion resulting in his giving evidence 'against himself'.

But Art. 20 (3) does not defeat the statutory provisions for searches contained in Secs. 94 and 96, Cr.P.C. Searches are made under the authority of a magistrate (excepting in the limited class of cases falling under Sec. 165 Cr.P.C.). So the issuance of a search warrant is a judicial function. When such judicial function is interposed between the individual and the officer's authority for search, no fundamental right can be said to be circumvented.⁸⁶

The protection afforded to an accused under Art. 20 (3) in so far as it related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him.⁸⁷

But if the accused himself submits to give his thumb impression or if has raised no objection to give his thumb impression, he cannot seek the aid of the guarantee.⁸⁸ The Allahabad ruling which held that an order directing an accused to furnish his specimen writing under Sec. 73 of the Evidence Act was not hit by Art. 20 (3) is not beyond doubt. If he does refuse the Court draws a presumption against him. This tantamounts to compelling him to be a witness though the Court in the instant case held it was not.⁸⁹

Even if the accused's name is not mentioned in the F.I.R. (First Information Report), the moment suspicion attaches to a person, and he is taken in custody and interrogated, he is entitled to the protection under Art. 20 (3).⁹⁰ The protection is also against the compulsory production of documents. But if it is a public document, no such protection exists *e.g.* Licence under the Orissa Food Grains Control Order, 1951 enjoined to keep register dealing with purchase, storage and sale of rice and paddy.⁹¹ This was a public document which could be summoned under Sec. 94, Cr.P.C., by the Magistrate on pain of the prescribed penalty for non-compliance.⁹¹

The immunity granted by Art. 20 (3) cannot extend to civil proceedings.⁹² The fact that the answers given might tend to subject the person to some future criminal prosecution will not attract Art. 20 (3). The intendment of the article was to afford some protection to a person involved in a crime *in presenti*. To interpret it as applying to all proceedings civil or criminal which might at a subsequent period expose the person concerned to prosecution on

Cut. 200.

86. *Mohammad Hussein v. Provident Fund Inspector*, A.I.R. 1957 Madh. B. 68, relies on A.I.R. 1954 S.C. 300.

87. *State v. Ramkumar Ramgopal*, A.I.R. 1957 Madh. Pra. 73.

88. *Bhanleka Behera v. State*, A.I.R. 1957 Orissa 172, I.L.R. (1957)

89. *Swarup v. State*, A.I.R. 1958 All. 119 Dissents from A.I.R. 1957 Madh. Pra. 73.

90. *Amin v. The State*, A.I.R. 1958 All. 293.

91. *Madan Lal Jogodia v. The State*, A.I.R. 1958 Orissa 1: I.L.R. 1957, Cutt. 564.

the basis of answers given by him, is to enlarge the scope of this article and to defeat justice.⁹²

The principle underlying the protection offered under Art. 20 (3) consists in balancing the advantages of an effective detection of crime, with information collected from all sources, against the observance of civilized standards of enquiry and the upholding of the dignity of man. The framers of the constitutions of India and America have given preference to the latter. The objection to an intrusion into a man's privacy or his personal degradation in the course of eliciting evidence of a suspected kind is rooted in the consciousness of peoples who value the liberty of the individual and the right to a protection from such intrusion or degradation has come to be regarded as one of fundamental rights.⁹³

The protection is available to a person answering a notice to produce documents under Sec. 171A of the Sea Customs Act and the search warrant content does not exclude the possibilities of a criminal prosecution.⁹⁴ 'Offence' is defined in Sec. 3 (38) of the General Clauses Act as any act or omission made punishable by the law for the time being in force. Breaches of customs laws come under this category.⁹⁴ The language of Art. 20 (3) is 'to be witnesses' and not 'to appear as witnesses', and hence the extortion of any evidentiary material even at the stage of investigation is within the condemnation of the article.⁹⁴

The provision against self-incrimination is subject to following limitations: (a) It is open to the accused to waive the privilege. But if he waives the privilege and gives testimony on any point, he must give the whole of it; (b) where an accused has been pardoned or otherwise given immunity from prosecution, it may be compelled to give evidence. But before the accused may be so compelled, he must be given complete immunity. (c) The immunity is merely from giving evidence against the consent of the accused. The prosecution is not debarred from exhibiting his finger-prints, photographs etc. Nor does the immunity prevent production of testimony that blood was discovered on the body of the accused after the alleged crime or marks and bruises were found upon the accused's body, on accused's shirt being taken off his body. But a compulsory direction by the magistrate in proceedings under Sec. 488, Cr.P.C., to the defendant to give his blood for blood test being made cannot be supported. The only consequence of a refusal to submit to the blood test may be that it will be taken into consideration along with other circumstances in evaluating the evidence against him.⁹⁵

The constitutional immunity in Art. 20 (3) is not without its well recognized limitations. The privilege is not restricted to any and every compulsion but to testimonial compulsion. But as a condition of statutory immunity from prosecution, assertion of privilege against self-incrimination is necessary.⁹⁶ Taking of thumb, finger and palm impressions of the accused in the court of the magistrate under his directions cannot be said to contravene

92. *Suryanarayana v. Vijay Commercial Bank*, A.I.R. 1958. And. Pra. 756 relies on A.I.R. 1953 S.C. 325 and A.I.R. 1954 S.C. 300. Dissents from A.I.R. 1956 Cal. 253.

93. *Collector of Customs v. Calcutta Motor Cycle Co.*, A.I.R. 1958 Cal. 682. Refers to *U.S. v.*

White, 322 U.S. 694: (1944) 88 Law Edn. 1542 *Palko v. Connecticut*, 302 U.S. 319; (1937) 82 Law Edn. 288.

94. *Ibid.* A.I.R. 1953 S.C. 325 distinguished.

95. *Subbaya Goundan v. Bhoopala Subramanian*, (1957) M.L.J. (Cr.) 822.

Art. 20 (3). The provision of Sec. 5 of the Identification of Prisoners Act, 1920, cannot therefore be held to be unconstitutional as violative of the constitutional guarantees against testimonial compulsion.⁹⁶

The fact that the answers given by a person examined under Sec. 45-G of the Banking Companies Act might tend to subject him to a criminal prosecution at a future date will not attract the prohibition envisaged by Art. 20 (3).⁹⁷ The intendment of the article is only to afford protection to a person involved in a crime, having regard to the predicament in which he would be placed.

In a recent Mysore case,⁹⁸ it was pointed out that Sec. 342, Cr.P.C. does not offend Art. 20 (3) as also Sec. 27 of the Evidence Act which renders admissible information furnished by an accused after his arrest leading to discovery of any article.

In *R. C. Gupta v. The State*^{98a} the Allahabad High Court held that a search warrant issued to the accused petitioner under Sec. 94 Cr.P.C. was against the principles laid down in Art. 20 (3). The expression 'to be a witness' has to be read in a wide sense to include 'furnishing of evidence'. In *M. P. Sharma v. Satish Chandra*^{98b} the Supreme Court of India had stated the same view while considering the effect of a warrant issued to the accused under Sec. 96 Cr.P.C. They stated "To be a witness is nothing more than to furnish evidence and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. . . It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained by him."

Is Sec. 342 (2) and (3), Cr.P.C., 'ultra vires' of Art. 20 (3)?

1. It is apposite to consider the guarantee extended in Art. 20 (2) in relation with the provision given to a court to examine an accused under Sec. 342, Cr.P.C. Such questions under Sec. 342 (1) may be put to the accused without any previous warning and the questions may be generally on the case or such as the court thinks necessary.

Sec. 342 (2) states:

"The accused shall not render himself liable for punishment by refusing to answer such questions, or by giving false answers to them, but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just."

Sec. 342 (3):

"The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

Sec. 342 (4):

96. *Pakhar Singh v. State*, A.I.R. 1958 Punj. 294.

97. *Suryanarayana v. Vijaya Commercial Bank*, (1958) And. W.R. 331. Relies on A.I.R. 1954 S.C. 375 and A.I.R. 1957 Cal. 520. Dis-sents from A.I.R. 1956 Cal. 253. Vide Willis on 'Constitutional

Law of the U.S.' pp. 518, 524. 'American Jurisprudence' Vol. 58 p. 49.

98. *In re Govinda Reddy*, A.I.R. 1958. Mys. 150.

98a. A.I.R. 1959. All. 219 follows A.I.R. 1954 S.C. 300.

98b. A.I.R. 1954 S.C. 300.

"No oath shall be administered to the accused when he is examined under sub-section (1)."

The object of Sec. 342 is said to be laudable in that it affords an opportunity to the accused to explain any matter appearing against him in the evidence.⁹⁹ Of course, the court must not use this power to be a sort of inquisition or cross-examination to buttress the prosecution.¹ Decisions have laid down that any abuse of this power by the court may vitiate the trial.² Of course, cl. (2) of Sec. 342 states that it is left to the option of the accused to refuse to answer. So it is not a case of compulsion but voluntary to that extent. But the sting lies in this that as per cl. (2) the court may draw such inference from such refusal or answers as it thinks just. Clause (3) directs that the answers given by the accused may be taken into consideration for or against him in that or any other enquiry. Clause (3) may in a way (though not clearly) be explained to be *intra vires* of Art. 20 (2) as the accused had the option to refuse to answer under cl. (2) and so any voluntary answer is not barred under Art. 20 (2) which only prohibits that "an accused cannot be compelled to be a witness against himself." If that is so, the latter portion of Sec. 342 (2) that the court and jury may draw such inference from such refusal or answer indicates a legal coercion. Obviously, the accused's refusal to answer also can be adversely commented. Where then is the voluntary nature of the answer? In English law there is no such power except putting questions incidental to the trial, *i.e.* whether he wishes to cross-examine a witness. Sir FitzJames Stephen rightly characterised Sec. 342 as "embarrassing, illogical and hypothetical".

In this context the latter portion of Sec. 342 cl. (2) and even the earlier portion of cl. (3) seem to run against the spirit of Art. 20 (3). The use of answers by the accused for consideration by court would naturally amount to compel him to give evidence against himself. 'Consideration by the Court' means also 'unfavourable' or 'favourable' consideration in relation to the accused's defence. When the refusal to answer itself [cl. (2)] can be considered by the court, the earlier portion of cl. (3) gets clearly tainted as *ultra vires* of Art. 20 (3). If in a case of circumstantial evidence, the statement of the accused under cl. (3) puts him in great jeopardy,³ as conclusive of his guilt there cannot be a worse invasion of the rights vouchsafed under Art. 20 (3).

But in *Ranjit v. State*,⁴ it was held that Sec. 342 (3), Cr.P.C., is not *ultra vires* of Art. 20 (3). The reasoning given was: "As it is entirely a matter of option with the accused to answer or not when he is questioned under Sec. 342, Cr.P.C., and as oath cannot be administered to him as to a witness and his evidence cannot be put in evidence in that trial or enquiry, there is no chance of the accused being compelled to be a witness under Sec. 342. That he is not a witness when he answers the questions put to him under Sec. 342 also follows from the definition of the word 'evidence' in Sec. 3 of the Evidence Act. Therefore, Sec. 342, Cr.P.C., is not *ultra vires* of Art. 20 (3) of the Constitution." It is meant to test in another way the truth of the prosecution evidence by the explanation offered by the accused.

But we feel the matter is not yet clearly and fully answered in view of

99. Hossain Bux 6. Cal. 96. Paramattanath 50 Cal. 118.

1. *Phillips v. Emperor*, A.I.R. 1942 Oudh 321. *In re Seshapanichetty*, A.I.R. 1937 Mad. 209. *Subbarao v. Venkatta Chhelapathy Ayyar*, A.I.R. 1938 Mad. 904.

2. Bolanath (1928) 51 All. 313.

3. Abdul Ghani, 49 Bom. 478.

4. A.I.R. 1952 H.P. 81. See also *In re B. N. Ramakrishna*, A.I.R. 1955 Mad. 101.

5. See Basu's 'Commentary on the Constitution,' p. 151.

our doubts set out in the prior paras. Mr. Basu in his commentary⁵ also states: "Now that cl. (3) of Art. 20 of the Constitution accepts the English rule of burden of proof by prohibiting self-incriminating evidence altogether, it would, it is submitted, render unconstitutional the provisions of the earlier part of Sec. 342 (3) of the Cr.P.C. in so far as the use of the answers given by the accused to court questions against him would amount to compelling him to give evidence against himself." But another learned commentator Mr. Agarwala⁶ is inclined to observe: "It is to be observed that courts have construed these clauses of Sec. 342, Cr.P.C., in such a way as to take away the possibility of much mischief and have held that refusal to answer the court's questions or his answers to such questions should not be allowed to strengthen the prosecution case or fill up the lacuna therein to the prejudice of the accused." But we submit all these factors do not take away the inherent possibility of the abuse of Sec. 342 contrary to the principle set out in Art. 20 (3). We are strengthened further by the view of Mr. V. V. Chitlay,⁷ who rightly recalls the case *Wilson v. United States* wherein the Supreme Court of America held that failure to examine himself as a witness must not jeopardise the accused in raising a presumption against him. That will be virtually compelling him to be a witness. May be the letter of the law is satisfied in Sec. 342 in that the accused is not administered an oath to be called a witness. But the latter portion of cl. (2) of the section and earlier portion of cl. (3) appear to make it clear that the refusal to answer by the accused or the answer of the accused will be considered against him in that case or in any subsequent enquiry or trial. That is enough, we think, to make us feel that the principles set out in Art. 20 (3) are thereby violated in a sufficient measure. The pith and substance of clauses (2) and (3) appears to contravene Art. 20 (3). No doubt, the reasoning adopted in *Ranjit v. State* may satisfy technicalities but not the substance or core of the principle of immunity from self-incriminating statement as adumbrated in Art. 20 (2).

Even in the new Sec. 342 as amended by Act XXVI of 1955, there is no substantial change except in cl. (4) where it is stated, "No oath shall be administered to the accused when he is examined under sub-section (1)." The old clause omitted the words "when he is examined under sub-section (1)," since a new Section 342-A has been added by the 1955 Act which permits the accused to examine himself on oath as a defence witness. The two conditions stipulated in Sec. 342-A are that (1) the accused can be his own witness only at his own request in writing. (2) The failure to give evidence by accused shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial.

How far this provision is an advantage to the accused in India where the masses are illiterate and an accused who may be innocent will be generally a bad witness, it is too early now to assess as the amending statute is rather too recent.

Of course, it may be stated that while considering Sec. 342, the right given to the court to draw an adverse inference against the accused imposes some compulsion upon him, though it may be urged that it is a far cry from saying that it compels him to be a witness against himself.⁸ A statement made by an accused is not evidence because it is not by a witness but is a matter

6. 'Fundamental Rights and Constitutional Remedies,' p. 482.

7. 'Commentaries on the Constitution of India,' Vol. I, p. 500.

8. *Banwari Lal v. The State*, A.I.R. 1956 All. 341: C.L.R. 1955. All. 133.

which may be taken into consideration by the court in order to decide whether it believes the fact to exist.

Section 342-A, Cr.P.C., is again *intra vires* since the option is given to the accused to examine himself or not as a defence witness and no presumption should be drawn against such non-examination. But it is easy to feel that conditions in which an accused is placed may lead sometimes to infringement of Art. 20 (3). An element of slight compulsion may lurk in actual practice but that will not be legally and constitutionally enough to attract Art. 20 (3).

A direction by the court asking the accused to give his thumb impression amounts to asking him to furnish evidence which is prohibited under Art. 20 (3).⁹

2. There is again another question which takes us on to the amending of Sec. 342 (4), Cr.P.C., and Sec. 5 of the Oaths Act consequent on Art. 20 (2).

In English law an accused can be a witness on his behalf. In India he cannot figure as a witness at all. Sections 5 and 6 of the Indian Oaths Act states that no witness can be examined except on oath or solemn affirmation and that an accused cannot be put to oath. Sec. 342 (4) bars any oath being administered to an accused. Art. 20 (3) states: "No person accused of an offence shall be compelled to be a witness against himself." The prohibition is as a witness 'against himself'. If in Sec. 343 (3) the answer is taken favourably to the accused it is not 'against the accused'. But an accused cannot be a witness 'against himself'. Sec. 118 of the Evidence Act states that all persons shall be competent to testify except when prohibited by court for certain reasons as to age, mental condition etc. If the word 'accused' includes 'all persons' then accused must be qualified to be a witness by administration of an oath. Art. 20 (3) only prohibits testimony of accused against himself. Testimony in the accused's own behalf is not prohibited. But if this is to be real, then there must be amendment of Sec. 342 (4), Cr.P.C., and Sec. 5 of the Oaths Act to enable the accused to be examined on oath if he so wishes. This will be in keeping with the liberality of the English law on the subject. The amended Criminal Procedure Code of 1955 has cured this in a way by extending an option to the accused to examine himself as a witness. How far it will be a true benefit to an accused in illiterate India is another matter. In very many cases an accused examining himself may make the matter worse. He loses the advantage of silence as it is the burden of prosecution to prove the case to the hilt.

Are provisions of the Evidence Act Secs. 26, 27, 29, 132, 146, 147 and Secs. 196 (7), 238A (1) (b) of Companies Act 'intra vires' of Art. 20 (3)?

In the Evidence Act 1 of 1872 the relevant provisions that may be taken up for our consideration are:—

- (1) Sec. 26. No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a magistrate shall be proved as against such person.

This provision allows an incriminating statement of an accused in custody made in the presence of a magistrate admissible. Rule 85, Cr.R. of Practice,

9. *Rajamuthu Koil Pillai v. Penasami Nadar*, A.I.R. 1956 Mad.

postulates the mode of recording of such confessions by a magistrate under Sec. 164, Cr.P.C. The confession has to be voluntary and the accused is to be warned that he is under no obligation to answer and if he elects to answer it may be used against him. Despite all the safeguards in Rule 85 and Sec. 164, Cr.P.C., though the confession may be really voluntary, yet once it is made it can be used against the accused. If so the question is if it is against Art. 20 (3). The Article only prohibits an accused from being a witness against himself. In a confession recorded under Sec. 164, Cr.P.C., there is no question of accused being a witness. If the statement is subsequently proved, it is proved independently by examining the recording magistrate. So the accused does not prove it or examine as a witness against himself. Only a statement of his is used against him and this may probably offend the spirit of Art. 20 (3) though not the letter of it. Unlike Sec. 342 (2), Cr.P.C., here no inference can be drawn by a court if the accused refuses to give a statement under Sec. 164, Cr.P.C. The very basic tenet of this section is that the confession must be absolutely voluntary. Retracted confession is never accepted unless it is corroborated by credible independent evidence.¹⁰ A confession made by an accused person before a magistrate but retracted at once when it was being read to him¹¹ or even while the certificate was being written¹² cannot amount to confession at all.¹³ So the ordinary law in Sec. 164 protects all coerced confessions or confessions tainted with any show of force or inducement. Mr. Venkoba Rao in his treatise states: "Neither the safeguard of the presence of the magistrate in the case of Sec. 26 of the Evidence Act, nor the subsequent confirmation by facts in the case of Sec. 27 can take them outside the inhibition against self-incrimination contained in Art. 20 (3) of the Constitution." At any rate it is clear that so far as Sec. 26 is concerned there is no question of its contravening Art. 20 (3). We must take Art. 20 (3) as it is, not as we would like it to be. Voluntary statements to be used against an accused as such is not prohibited in Art. 20 (3).

2. Sec. 27, Evidence Act:

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Confessions caused by inducement, threat or promise is inadmissible under Sec. 24 and the danger of admitting confessions made to police officers or when in police custody has been provided against in Secs. 25 and 26¹³ Section 27 is an exception to the general principle that a confession made by a person while in police custody cannot be proved against him unless it has been made before a magistrate and this exception should be interpreted as strictly as possible.¹⁴ Where in a case an accused has made the following statement: "About three months ago I had gone with some others and after breaking open the Alnawar Bank had stolen the amount therefrom and I will produce the amount that is with me now at my house at Mugatkhan Hubli of the Alnawar Bank Dacoity", it was held the words "I will produce the money" were alone admissible.¹⁴

10. *Sultan v. Emperor*, 1945 Lah.

91. *In re Periah Chelliah Nadar*, A.I.R. 1942 Mad. 450.

11. *Reg. v. Garbad Becher*, 9 Bom. H.C.R. 344.

12. *Arjan v. Emperor*, A.I.R. 1930

Lah. 257.

13. S. C. Sarkar's 'Law of Evidence', 1946 Edn., p. 271.

14. *Mareppa Ningrappa Kambar v. Emperor*, A.I.R. 1947 Bom. 90.

In another case¹⁵ where in the statement of the accused to the police he implicated himself as the person who decoyed the deceased and assisted in his murder holding the legs and that after the murder he and others carried the dead body and buried it in the burial ground it was held the entire portion should be excluded except the portion 'the body was buried' at a particular place.

So much of the confessional statement as leads to discovery of a fact is alone admissible. No doubt, courts have tried to zealously guard the rights of the accused in this regard. In Sec. 26 we have the guaranteeing presence of a magistrate for the voluntary nature of the incriminating statement. Section 24 seems to smell threat, inducement or promise from persons in authority. Section 25 altogether taboos confession made to a police officer. S. C. Sarkar records¹⁶ "confessions extorted by the police by oppression and tyranny or inducement are of frequent occurrence and it is to guard against this evil that the Section (25) has been enacted." . . . The police oppression and torture with a view to extorting confessions have been the subject of discussion in several reported cases and it is needless to refer to all of them separately. Unhappily such cases are not infrequent even now. (*In re Titus*, A.I.R. 1941 M. 720).¹⁷

The American law which prohibits improper obtaining of an accused's confession in a manner which offends 'Due Process of law' may also be viewed in this connection.

In the first report of the Indian Law Commissioners we have the significant words, "The Evidence taken by the Parliamentary Committees on Indian Affairs during the sessions of 1852 and 1853 and other papers which have been brought to our notice, abundantly show that the powers of the police are often abused for purposes of extortion and oppression and we have considered whether the powers now exercised by the police might not be greatly abridged."¹⁸

This presumption of illegal force by the police is sought to be excepted in Sec. 27 by the theory of confirmation by subsequent facts irrespective of whether the statement from the accused was legally or illegally obtained. The unworthiness of such testimonial utterances is sought to be rectified by subsequent confirmation of facts in the guise of so much of the statement of the accused as leads to the discovery of a fact being made admissible. It is submitted that at any rate after the Constitution of India came into effect and we have a guarantee under Art. 20 (3) forbidding the accused from being a witness against himself, it cannot be said that Sec. 27 is not tainted with a background of 'illegal force' employed in getting the statement. It practically amounts to compelling the accused to make an incriminating statement. Section 27 therefore appears to be *ultra vires* of Art. 20 (3). At any rate it deserves to be scrapped from the statute book as it tends to offend the spirit though not the letter of the Article. The special treatment of a confessional statement before an Abkari or prohibition officer also requires examination *de novo*. On account of the fact that illicit manufacture of arrack, toddy etc. will be on the sly in places too remote for eye witness a confessional statement got from the accused has hitherto been probably accepted as good evidence unless it is attacked and proved to be void on

15. *In re Vodde Nagappa*, A.I.R. 1948 M. 104 (2).

16. Sarkar on 'Evidence,' pp. 258, 259 (1946 Edn.) See *R. v. Babu Lal* 6 A 509.

17. See also *Santosh and others v. R.*, 9 C.L.J. 663: 13 C.W.N. 861.

18. Quoted in Sarkar's 'Evidence', p. 259.

account of any force, threat or promise. The presumption that a police officer must have used force so as to invalidate a confession to him without the safeguards mentioned in Secs. 26 and 27 of the Evidence Act, may as well be extended to the Abkari or prohibition officer. The dividing line is rather thin. In fact the question was originally based on the interpretation of the expression 'police officer' in Sec. 25 of the Evidence Act. An excise inspector was not considered a 'police officer' and hence a confession to him was deemed not barred.¹⁹ But the latter view that excise officers empowered as police officers are 'police' officers within the meaning of Sec. 25 and so no confession to him is admissible.²⁰ There seems to be no essential difference between the functions of a police officer and an excise officer in relation to investigation, confessional statements and the possible abuse of power. In the light of the reasonings laid down in 1953 (2) M.L.J. 189,²⁰ it is proper not to make any distinction between confessions to a police officer and an excise officer. An authoritative pronouncement at the highest level is called for on this point. It must be added that in view of Art. 20 (3) statements recorded and used under Sec. 27 of the Evidence Act also will have to be considered as unconstitutional.

3. Sec. 29, Evidence Act:

"If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of deception practised on the accused person for the purpose of obtaining it, or *when he was drunk*, or because it was made in answers to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that the evidence of it might be given against him."

In *Olmstead's case*²¹ the Supreme Court of America opined that it was not necessary for purposes of admissibility of evidence that it should have been obtained by the nicest ethical standards. But after the Federal Communication Act, 1934, which forbids secret information by wire-tapping, the change is for evidence in the open and not in secret. Section 29 of the Indian Evidence Act may be amended in this light. To get a confession while drunk and call it voluntary is a contradiction as pure human volition is absent in a state of drunkenness and very possibly a drunken man may be subject to various factors in his bodily make-up and his words should not be given the weight of high probative value. When it is not voluntary but due to drunkenness, will it not be near to compulsion if such a statement taken in drunkenness is used against him? Then again, if answers to questions are refused and such refusal is construed against the accused [as in Sec. 342 (2), Cr.P.C.] there appears to be a violation of Art. 20 (3). It is therefore necessary to recast Sec. 29 by an amendment to remove all such doubts.

19. *Mahalakshmayya v. Emperor*, (1932) M.W.N. 453. *Dorasamy Nadar v. Emperor*, (1934) M.W.N. 394 (F.B.) *Public Prosecutor v. Mari Muthu Gowndan*, (1938) 1 M.L.J. 238. Distinguishing I.L.R. 51 Bom. 78 and I.L.R. 61 Cal. 607 (F.B.). See also *Venkata Reddi v. Emperor*, (1947) 2 M.L.J. 218. *In re Someshwar Shelat*, (1946) 1

M.L.J. 368.

20. *Public Prosecutor v. C. Paramasivam and others*, 1953 (2) M.L.J.P. 189 approving 51 Bom. 78 and 61 Cal. 607. The instant case was one after amendment of the Opium Act 1 of 1878 by the Madras Act 22 of 1951 *vide* Sec. 20A.

21. (1928) 277 U.S. 438.

4. *Sec. 132, Evidence Act:*

"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer."

A witness is sought to be protected by this section against any self-incriminatory statement. The protection is against arrest or prosecution or proof in any criminal proceeding except when he is charge-sheeted for perjury. But this Democle's sword of prosecution of perjury tantamounts to some amount of force in the matter of regulating the witness's testimony. He is compelled to make a statement under Sec. 132 on promise of pardon but with a threat of prosecution for perjury. This would amount to a literal violation of Art. 20 (3) only if it applies to an accused. Art. 20 (3) deals with an accused on trial and not a witness. Under the old Indian law an accused cannot at all be a witness on oath. This we have already discussed.²² But since the accused is now enabled by the 1955 Code of Criminal Procedure to depose on oath, the need for considering the above position does arise.

5. *Secs. 146, 147 and 148.*

These sections fall under the same category as Sec. 132 as regards constitutionality. These refer only to a witness and not to an accused.

6. *Sections 196 (7), 238A (i) (h) of the Indian Companies Act.*

Section 196 (7) stipulates that the notes of public examination of directors, promoters etc. may be used in evidence against the person examined in civil proceedings. Some Lahore cases²³ hold that such notes may be used against the deponent in criminal cases also subject to Sec. 132, Evidence Act. But on account of this Sec. 196 (7) cannot be deemed to be a violation of Art. 20 (3).

Sec. 238A (1) (h) punishes a director, past or present, who after the commencement of the winding up prevents the production of any book or paper affecting or relating to property or affairs of the company. If the papers are entirely private, they cannot be seized. But if they relate to affairs of the company, production under penal sanctions of S. 238A (1) (h) may not be *ultra vires* of Art. 20 (3). Since once the winding up proceedings commences, the properties of all descriptions of the company come into the custody of the court. They have to be held in such custody in the interests of the shareholders of the company. In such an event no compulsion or wrongful seizure can be read into the instance provision.²⁴

Sec. 171A of the Sea Customs Act.

The word 'offence' in Art. 20 (3) is to be construed by the General Clauses

22. Contrary view, see Mr. K. Venkoba Rao's 'Fundamental Rights', p. 181.

23. A.I.R. 1926 L. 385: 98 I.C. 809.

24. Contrary view is held in Mr. K. Venkoba Rao's 'Fundamental Rights', p. 182.

Act which defines it as meaning "any act or omission made punishable by any law for the time being in force." Article 20 (3) is not merely applicable to a criminal trial in court. It also applies to proceedings which may lead to such a trial. In proceedings under Sec. 171A of the Sea Customs Act the party is compelled to give evidence and to depose truthfully. He is also compelled to produce any document. In either case he incriminates himself and Sec. 171A was held to be *ultra vires* of Art. 20 (3).²⁵ Although such a proceeding is not in the course of a criminal trial it is obvious that it is preliminary to it.

Article 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

FOREIGN CONSTITUTIONS

The U.S.A.

The *5th Amendment* to the 1791 Constitution of U.S.A. says:

"No person shall be . . . deprived of his life, liberty or property without due process of law" [with reference to federal power]:

The *14th Amendment* [with reference to States]:

"Nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

The U.S.S.R.

Article 127 of the Soviet Constitution states:

"The citizens of the U.S.S.R. are ensured inviolability of the person. No one may be subjected to arrest except by decision of a Court or with the sanction of a Procurator."

Article 128 states: "The inviolability of the homes of citizens and privacy of correspondence are protected by law."

Japan.

Article XXXI of the 1946 Constitution says:

"No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

France.

Article 40 (4) of the 1937 Constitution reads:

"No citizen shall be deprived of his personal liberty save in accordance with law."

Burma.

Article 16 of the 1948 Constitution states:

25. *Calcutta Motor & Cycle Co. v. Director of Customs and others*, A.I.R. 1956 Cal. 253; 60 C.W.N.

67. See also A.I.R. 1956 Cal. 609.

"No citizen shall be deprived of his personal liberty, nor his dwelling entered nor his property confiscated save in accordance with law."

Rumania.

Article 28 of the 1948 Constitution of the Republic provides:

"The individual liberty of the citizens is guaranteed. No person shall be arrested and detained for more than 48 hours without a warrant from the Department of Prosecutions from the examining authorities appointed by law or an authorization from the courts in conformity with the provisions of the law."

Article 29 states:

"The home is inviolable. No person shall enter a citizen's home or residence without his consent save in his presence and in virtue of a written order from the competent authority or if the citizen is caught in the act of committing an offence.

Article 30 states:

"No person shall be condemned and suffer any penalty save in virtue of a judicial decision pronounced in conformity with the law."

Czechoslovakia.

Article 2 of the Constitution of the Republic (1948) says:

(1) "Personal freedom is guaranteed. It may be limited or withdrawn only in virtue of the law."

Article 3 states:

(1) "No person shall be tried except in the cases laid down by the law and then only by a court or authority competent under the law and in the manner prescribed by law.

(2) Unless caught in the act of committing an offence, no person shall be arrested except on the written order of a judge, giving reason therefor. The order shall be delivered at the time of arrest or if this is not possible within 18 hours thereafter.

(3) No person shall be taken into custody by a public official except in the cases prescribed by law; he must then be either released within 48 hours or brought before a court or authority which is competent to proceed with the case from the view of its nature."

The Federal Republic of Germany.

Section 2 of the 1949 Constitution provides:

(1) Every one has the right to develop his personality freely in so far as he does not violate the rights of others or offend against the constitutional order or moral law.

(2) Every one has the right of personal security of life and limb. Personal liberty is inviolable. These rights can only be curtailed by virtue of a law.

Hungary.

Article 57 of the 1949 Constitution of the Hungarian People's Republic states:

"The Hungarian People's Republic safeguards the freedom and inviolability of the person and the privacy of the home and correspondence of its citizens.

The German Democratic Republic.

Section 8 of the Constitution of 1949 states:

"Personal liberty, inviolability of the home, secrecy of postal communications and the right to settle in any place desired are guaranteed. The State can only take away these freedoms in pursuance of the laws applying to all citizens."

Costa Rica.

Section 20 of the Republican Constitution states:

"Every man is free in the Republic. No one who is under the protection of its laws shall be a slave."

Section 23 states:

"The home and all other private premises of persons living in the Republic shall be inviolable: Provided that they may be entered on written order of a competent judicial officer or to prevent offences from being committed or left unpunished or to avoid grave injury to persons or property subject to what is prescribed by law."

United Nations.

Articles 3 and 7 of the Draft Declaration of Human Rights reads:

"Every one has the right to life, liberty and security of person."

"No one shall be subjected to arbitrary arrest or detention."

[Compare also Articles 114 Weimar; 107 Czech; 5 (1) Yugoslav; 74 (1) Danzig Constitutions.]

Danzig.

Article 74 of the Free City of Danzig Constitution states:

"The liberty of the person has been declared inviolable and no limitation or deprivation of personal liberty may be imposed by public authority except by virtue of a law."

Korea.

The 1948 July Constitution states:

No citizen shall be arrested etc., unless according to law.

COMMENTARY ON FOREIGN CONSTITUTIONS.**England.**

Though there is no written constitution in England its Charters of Rights

assert the personal freedom of the individual citizen. The Magna Carta of 1215 assured:

"No man shall be taken or imprisoned, disseised or outlawed or exiled or in any way destroyed save by the lawful judgment of his peers or by the laws of the land." This was reasserted in the Bill of Rights of 1628. This principle goes by the well-known phrase 'The Rule of Law' in England. By the term law is here meant 'Laws of Parliament' as Parliament had been recognised as the supreme authority and repository of all laws. E. S. Wade²⁶ put it, "In England the doctrine of the supremacy of the common law had to be reconciled with the claims of Parliament to supremacy. The recognition of the legislative powers of Parliament precluded insistence on the part of lawyers that in common law there existed a system of Fundamental laws which Parliament could not alter, but only the judges could interpret." The doctrine of the rule of law as expounded by Dicey may be summed up thus:²⁷

- (1) In England no man can be made to suffer punishment or damages for any conduct not definitely forbidden by law.
- (2) Every man's legal rights or liabilities are almost invariably determined by the ordinary courts of the realm.
- (3) Each man's individual rights are far less the result of our constitution than the basis on which the constitution is founded.

Prof. Berriedale Keith²⁸ has laid down three basic principles enunciating the rule of law:

(1) The rule that judicial decisions shall be based upon the fixed principles already established.

(2) The rule that legislation must favour the limitation of executive and judicial power to deal arbitrarily with individual rights.

(3) The rule that the Government should jealously respect its legal limitations.

Dicey recognized in later days two legal checks upon abuse of judicial or quasi judicial power—

(a) The *ultra vires* doctrine, (b) natural justice.

'Law of the Land'—This term excludes arbitrary executive mindedness. It means fair hearing occasioned by a trial in accordance with the procedure set out by the law of the land.

Supremacy of Parliament.

The power of Parliament to lay down the law is paramount and sacrosanct even if it transcends reason and natural justice. This is on the principle that the rights of the common man are best safeguarded by Parliament which is the repository of all legal sanction. In the charters, such as the Bill of Rights of 1628, the Magna Carta of 1215 etc., what is meant by 'law' is absence of arbitrary power by the executive.

26. Dicey: 'Law of the Constitution,' 1952 Edn. Introduction Chapter by E. S. Wade, p. lxix.

27. *Ibid.* p. lxxvii.

28. Ridge's 'Constitutional Law of England,' 6th Edn., 1937, p. 25.

That is, no man can be punished except after being tried for an offence as violation of an 'enacted law' in the 'ordinary legal manner'. In *Eshugbayi v. Government of Nigeria*²⁹ the Privy Council put it thus, "In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

The supremacy and legislative competency of Parliament was portrayed in the following words: "The concessions of *Magna Carta* were wrung from the King as guarantee against oppressions and usurpations of his prerogative; it did not enter the minds of barons to provide security against their own body or in favour of the Commons by limiting the power of Parliament. . . . The omnipotence of Parliament was absolute even against common right and reason." To put it crisply, "The subject is entitled to have the law impartially administered; but he has no right that the law should not be changed to his detriment. In other words, he has no absolute rights which are guaranteed against an act of Parliament. This is in consequence of the general principle that Parliament is sovereign."

Sir Erskine May while writing on Parliament's supremacy on all matters or persons within its jurisdiction said, "A law may be unjust and contrary to the principles of sound Government. But Parliament is not controlled in its discretion and when it errs, its errors can be corrected by itself."

The absurdity of this state of things can be visualized in the words of Leslie Stephen: "If a Legislature decided that all blue-eyed babies should be murdered the preservation of all blue-eyed babies would be illegal." The faith of the common man in the wisdom of Parliament is unique in England. If Parliament enacts any law depriving a man of his life or liberty contrary to accepted notions of 'justice' or 'due process', no court could override such a 'law'. In *Liveridge v. Anderson* Lord Wright observed, "All the courts today, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute."

Arrest without warrant.—In England the police have considerable powers of arrest on suspicion though there is no power of arbitrary arrest. In the leading case *Christie v. Leachinsky*³⁰ the following propositions were set out regarding the freedom of person in relation to arrests:

1. If a police officer arrests without warrant on reasonable suspicion of felony or of other crime of a sort which in the circumstances, does not require a warrant—he must 'in ordinary circumstances' inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. A citizen is entitled to know on what charge or on suspicion of what crime he is seized.

2. If the citizen is not so informed, the police officer apart from certain exceptions is liable for false imprisonment.

3. The lawfulness of the arrest does not depend on whether the charge subsequently made is the same charge as that on which the arrest took place.

29. A.I.R. 1931 P.C. 248 (252).

30. (1947) 1 All. E.R. 567.

Nor is it wrongful to arrest and detain a man on a charge of which he is reasonably suspected with a view to investigation of a second charge on which the information is incomplete.

4. The requirement that the person arrested should be informed of the reason why he is arrested does not exist if the circumstances are such that he must know the general nature of the offence for which he is arrested—*e.g.*, when he is caught red-handed or if the accused creates a situation which makes it impossible to inform him—*e.g.*, by immediate counter-attack or by running away.

5. There can be an arrest effected by a private citizen without a warrant on reasonable suspicion of any person suspected of 'felony' provided the felony has been committed by some one. A police officer can arrest without warrant on a reasonable suspicion of a felony whether that has been in fact committed by any one or not. In both these cases it is unlawful not to disclose the grounds of arrest to the arrested person.

Lord Simons stated in the above case,^{30a} "I would therefore submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested. . . . This case will have served a useful purpose if it enables your Lordships once more to proclaim that 'a man is not to be deprived of his liberty except in due course and process of law'."

General warrants.—In general warrants no names will be specified and they are ancient in history from the days of the Court of the Star Chamber. Since warrants were held illegal and void Lord Camden, C.J., stated in *Entick v. Carrington*,³¹ "If such warrants were legal the secret cabinets and bureaux of every subject in this Kingdom will be thrown open to the search and inspection of a messenger whenever the Secretary of State shall think fit to charge, or even suspect a person to be the author, printer or publisher of seditious libel. . . . And with respect to the argument of state's necessity, or a distinction which has been arrived at between state officers and others, the common law does not understand the kind of reasoning nor do our books take notice of any such distinctions."

The exceptions to the veto against general warrants can, however, exist in the case of official secrets and in case where there is incitement to fighting forces towards disaffection or disloyalty. In case a justice of the peace is satisfied of the grounds of suspicion that an offence in connection with official secrets has been or is about to be committed, he may issue a general warrant ordering search of any papers at premises. In any emergency a Superintendent of Police may also exercise this power, as provided in the Official Secrets Act of 1911. Other statutes also give such authorisation, *e.g.*, for explosive materials intended for criminal purposes, forged documents, counterfeit coins, obscene pictures and books, brothels etc. Section 42 (2) of the Larceny Act empowers in certain cases search for stolen properties without any warrant.

Habeas Corpus.—The remedy for infringement of personal freedom lies in the right of defence in a criminal case to prepare a complaint for the injury or assault, to sue for damages in a civil action or to apply for a writ of Habeas

30a. (1947) 1 All. E.R. 567.

31. *Leach v. Money*, (1765) 19 St. Tr. 1002. *Wilkes v. Wood*,

(1763) 19 St. Tr. 1153. *Entick v. Carrington*, (1765) 19 St. Tr. 1030.

Corpus. In successive Acts of Parliament in 1640, 1679 and 1816 the writ of Habeas Corpus ('Have the body' or 'Produce the body') has been perfected. The court issues a *rule nisi* to show cause why the imprisoned person should not be released. If the court finds on a scrutiny of all papers that the detention or imprisonment is unlawful it may make the rule 'absolute' and release the prisoner. If the court remands him to custody, even then it may order that he be tried within a limited time or set free. Judges are put to severe restrictions by the Habeas Corpus Act in the discharge of their duty. It imposes severe penalties on judges and to their persons who fail to do their duty in this 'Habeas Corpus' jurisdiction.

Dicey has put it:³² "The judges therefore are in truth though not in name invested with the means of hampering or supervising the whole administrative action of the Government and at once putting a veto upon any proceeding not authorised by the letter of the law."

O'Brien's Case.—The famous case of the *Secretary of State v. O'Brien*³³ is important. In March 1923 O'Brien was arrested in London by the orders of the Home Secretary and for deportation to Dublin. The charge was he was plotting against the Government of the new Irish Free State and therefore he was to be interned there. In the next month O'Brien applied to a Divisional Court of three judges for a writ of Habeas Corpus against the Home Secretary. It was refused. He then applied to the Court of Appeal which granted the writ in May. But as the Home Secretary had not actual custody of the applicant, the former was allowed one week to obey the writ. Taking advantage of this interval the Home Secretary appealed to the House of Lords which body declined to interfere and set O'Brien free. The Home Secretary buttressed himself in getting an Act of Indemnity passed under which O'Brien was given pecuniary compensation as otherwise O'Brien could have filed a criminal prosecution and a civil suit against the Home Secretary for illegal imprisonment.

Three important rules emerge from this decision delivered by Lord Birkenhead:

1. When a writ is applied against a person the writ will issue against him even if he has ceased to hold the prisoner.
2. The applicant may go from one court of competent jurisdiction to another until he obtains the writ. Thus there can be successive applications which must be dealt on the merits of each case.³⁴
3. When any court has ordered the release of the prisoner, there is no appeal against such order.

When a prisoner fails in a writ at the hands of the High Court or one of its judges, he may appeal to the Court of Appeal and thereafter, subject to certain conditions, to the House of Lords. But if deportation has been ordered under the Fugitive Offenders Act, 1881, and the affected person fails to obtain the issue of the writ in the King's Bench decision, he cannot have recourse to a Court of Appeal.³⁵ So also when any court orders the release of an extradited prisoner, there can be no appeal against it. The right of personal freedom is open to aliens as well as subjects.

32. Law of the Constitution, 8th Edn. p. 20 f.

33. 1923, A.C. 603.

34. See *Eshubayi Etella v. Nigerian*

Government, 1925 A.C. 459.

35. *Ex parte Savarkar*, 1910, 2 K.B. 1056.

Parliament may suspend Habeas Corpus Act during declared emergencies. The object is to give Government a free hand to deal with a critical situation as suits the exigency. Thus any irregularity or illegality is condoned by Parliament by the very needs of the emergencies. During the First World War such situation arose, Justice Bailhache stated in a case:³⁶ "Above the liberty of a subject, is the safety of the realm. . . . When the internment of an alien enemy is considered by the executive Government charged with the protection of the realm, desirable in the interests of the safety of the realm, —the action of the Government in so doing is not open to review by the courts of law by Habeas Corpus." In the Second World War also the Habeas Corpus Act was suspended. Detention without trial to the satisfaction of the Home Secretary was perfectly legal then. Parliament put in another condition that "he must have reasonable cause to believe".

Liveridge's case (Liberty of subject curtailed during emergencies). This case³⁷ which arose during the Second World War laid bare certain features of the Habeas Corpus law. The Home Secretary ordered detention of Liveridge stating that he had reasonable cause to believe him to be a person of hostile association with the enemy country. Liveridge brought a suit claiming damages for false imprisonment and asking for a declaration that the detention was illegal. Good faith of the Home Secretary, Sir John Anderson, was not challenged. The latter did not place the court in possession "as to the reasonable grounds of belief". The House of Lords construed the latter words merely meant acting on what the Home Secretary thought it reasonable to believe in good faith on information in his possession. Lord Maugham pronouncing the judgment put it thus:

- (1) That it was a matter of executive discretion.
- (2) That the Minister was not acting judicially and, therefore, could act on hearsay.
- (3) That he must necessarily be relying upon confidential information.
- (4) The Home Secretary is responsible to Parliament for the exercise of the power entrusted to him. So until the contrary is proved the order of detention holds good in law.

Their Lordships observed: "The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed especially in matters so fundamental to the liberty of the subject. However, in a time of emergency when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure."

Their Lordships added, ". . . The purpose of the regulation is to ensure public safety and it is right to interpret emergency legislation as to promote rather than defeat, its efficacy for the defence of the realm. This is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulation in peace time as well as in war time." Lord McMillan added, "However precious the personal liberty of the subject may be, there

36. *R. v. Superintendent of Vine Street Police Station Ex parte Lisbmann*, (1916). 1 K.B. p. 275.

37. *Liveridge v. Anderson*, (1912) A.C. 206.

is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in war or escape from national plunder or enslavement."

The House of Lords observed in *R. v. Halliday*,³⁸ while upholding the validity of Regulations made under the Defence of the Realm Act, 1914, authorising the Home Secretary to intern certain persons without trial for securing public safety and defence of the realm, "It is beyond dispute that Parliament has the power to authorise the making of such a regulation. The only question is whether on a true construction of the Act, it has done so.

... It may be necessary in a time of great public danger to entrust great powers to His Majesty-in-Council and that Parliament may be so feeling certain that such powers will be reasonably exercised. ... It is urged that if the legislature intended to interfere with personal liberty it would have provided as on previous occasions of national danger for suspension of the rights of the subject as to a writ of Habeas Corpus. The answer is simple. The legislature has selected another way of achieving the same purpose. ..."

But Lord Maugham in *Liveridge's* case put it in more clear words: "The suggested rule (that the legislation encroaching upon the liberty of the subject should be construed in favour of the subject) has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the state is involved." But Lord Atkins in *Liveridge's* case, however, dissented and stated spiritedly that the words "if he has reasonable cause to believe" did not mean "if he *thinks* he has reasonable cause". ... "the onus is on the person who arrested to prove the reasonable grounds and the issue of whether the cause is reasonable or not is to be determined by the judge. ... In this country amidst the clash of arms (war time) the laws are not silent."

In *Greene v. Home Secretary*³⁹ the application for Habeas Corpus by Greene against the Home Secretary was dismissed by the House of Lords on the same reasoning as in *Liveridge's* case but Lord Atkins concurred with Lord Maugham. In this case as the Home Secretary had filed a statement setting out particulars and stating that he had acted on information from responsible and experienced persons.

The above two cases show the attitude of the judiciary in wartime England.

But the normal common law assured an accused by a writ of Habeas Corpus—

- (1) that he will either be tried within a limited time or released;
- (2) that a charge will be laid against him within a reasonable time before trial setting out the details of specific offence committed and a specific day and specific place;
- (3) that he will be given ample time to prepare his defence;
- (4) that he will be entitled to legal assistance before and during trial;
- (5) that he will be tried in open court with full opportunity to cross-examine witnesses who must be put on oath;
- (6) that he is protected from self-incriminating statement; he can opt to examine himself or not;

38. (1917) A.C. 260.

39. (1942) A.C. 24.

- (7) that he is entitled to the benefit of doubt;
- (8) that he has a right of appeal though the State cannot appeal against an acquittal.

Personal liberty, according to Blackstone,⁴⁰ "consists on the power of locomotion, of changing situation or moving one's person to whatsoever place one's inclination may direct without imprisonment or restraint unless by due process of law." This phrase 'due process of law' occurs first in a statute of the 14th century (28 Edw. III 3) from where the later American Constitution borrowed the phrase. Blackstone's concept is adopted by H. J. Stephen⁴¹ and Cooley.⁴² Edmund Burke coined the words 'regulated freedom' when defining 'liberty'. Webster⁴³ says, "The creation of law, essentially different from that unauthorised licentiousness that trespasses on right. It is a legal and refined idea, the offspring of high civilization which the savage never understands and never can understand." Liberty is an adjunct or offspring of wholesome restraint on others.

U.S.A.

Doctrine of Due Process of Law.—The Fifth and Fourteenth Amendments of the Constitution of U.S.A. assure that the Federal or State authorities have no power to deprive a person of his life, liberty or property without 'due process of law'. So the laws regulated or administered must satisfy this rule of 'due process' to be *intra vires*. The supremacy of Parliament whose laws cannot be questioned at all in England is absent in the U.S.A. where courts can go into the question of *intra vires* and *ultra vires*. The U.S. Supreme Court has often made constitutional law in its interpretative jurisdiction.

We have discussed the doctrine of 'due process' under Art. 14 of the Constitution. It may be appropriate to quote again the Dartmouth College case⁴⁴ that 'due process' "is the process of law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern society." In other words "due process" enables the judiciary to nullify a statute which is otherwise valid on the ground it smacks of arbitrariness, contrary to principles of natural justice and repugnant to accepted notions of justice and general rules established in their system of jurisprudence for the security of private rights. The courts thus intervened under the 'due process' clauses in all cases where injustice has been caused such as—

- (1) Where a statute did not secure reasonable time and opportunity for engagement of counsel in a criminal case.⁴⁵
- (2) Where a statute vaguely defines an offence so as to be unintelligible to the common man to make him aware that he is or not committing the offence.⁴⁶ In other words, there should be an ascertainable standard of guilt.⁴⁷

40. 'Commentaries on laws of England,' 4th Edn., p. 134.

41. 'Commentary on the Laws of England.'

42. Treatise on 'Constitutional Limitations,' 8th Edn. Vol. I, p. 710.

43. Vol. 2, p. 369 of 'Webster's Works'.

44. (1819) 4. Wh. 418 See also

Hager v. Reclamation Dist., (1884) 111 U.S. 701.

45. *Powell v. Alabama*, (1932) 287 U.S. 45.

46. *Lazette v. New Jersey*, (1939) 306 U.S. 451.

47. *U.S. v. Cohen Grocery*, (1921) 253 U.S. 81.

- (3) Where a statute denies access to the courts⁴⁸ and imposes conditions as would amount to a denial of relief by judicial process.⁴⁹
- (4) Where a statute which thought it gives judicial review, allows such irreparable injury pending the review, as would demonstrably show the remedy to be merely illusory.⁵⁰
- (5) Where in a criminal case (a) the denial of legal assistance works as 'fundamental unfairness';⁵¹
 - (b) or trial is vitiated by pressure from any mob or other external forces;⁵²
 - (c) or where the accused is convicted upon coerced or involuntary confessions.⁵³

The cardinal principles governing a criminal trial is that "no person could be punished except for a violation of definite⁵⁴ and validly enacted laws and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights."⁵⁵ The point is an assurance of a really 'fair trial'. In *Tumay v. Ohio*⁵⁶ it was aptly stated, "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."

Storey⁵⁷ puts it amply thus: "The deduction is that life, liberty and property are placed under the protection of known and established principles which cannot be dispensed with either generally or specially, either by courts or executive officers or by legislators themselves. Different principles are applicable in different cases and require different forms and proceedings; in some they must be judicial; in others Government may interfere directly and *ex parte*; but due process of law in each particular case means such an exertion of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs. When life and liberty are in question there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction and a conviction and judgment before the punishment can be inflicted."

Willis⁵⁸ sums up beautifully thus: "The guarantee of due process of law is so all-inclusive that all constitutional guarantees could be abolished and there still would be sufficient protection to personal liberty. . . . Due process of law applies to personal liberty to social control, to procedure, to jurisdiction and to substantive law. . . . No better scheme could have been involved to

48. *Ex parte Young*, (1908) 207 U.S. 123.

49. *Missouri P.R. Co. v. Tucker*, 230 U.S. 340.

50. *Natural Gas Pipeline Co. v. Slaterry*, 302 U.S. 300.

51. *Gibbs v. Burke*, (1949) 337 U.S. 773.

52. *Moore v. Dempsey*, (1923) 261 U.S. 86.

53. *Brown v. Mississippi*, (1936) 297 U.S. 278. See also *Ashcroft v.*

Tennessee, (1944) 322 U.S. 143. *Chambers v. Florida*, (1940) 309 U.S. 716.

54. *Connolly v. General Construction Co.*, (1926) 269 U.S. 385.

55. *Feldman v. United States*, (1943) 322 U.S. 487.

56. (1927) 273 U.S. 510.

57. Storey's 'Constitution,' 4th Edn., Arts. 1943-6.

58. 'Constitutional Law,' pp. 642-43.

permit the Supreme Court to strike the proper balance between personal liberty and social control. Legislatures may have reasons for the enactment of laws, but the United States Supreme Court measures the legislatures' reasons with its own intellectual yard-stick."

In short 'due process' is the omnibus and universal panacea for all things unjust, improper and opposed to accepted notions of natural justice. The later day trend of American writers is that due process as a substantive restriction is gradually disappearing leaving it principally in its original status as a restriction upon procedure.⁵⁹ Procedural 'due process' consisted in 'settled usages and modes of procedure' such as fair hearing, right to be defended by counsel etc. Substantive 'due process' takes us to the 'reasonableness' of the law in question and warns us against an undue exercise of police power such as in the field of *eminent domain*, taxation, regulation of inter-State and foreign commerce, and equal protection of the laws. Aliens as well as citizens are entitled to the benefit of the due process of law clause.

Due process prevents the States from taking private property for public use without just compensation.⁶⁰ A citizen can waive due process of law by consent but he cannot later turn round and complain of denial of it. Restrictions on personal rights must be reasonable, otherwise it will offend due process of law. In *Lochner v. New York*,⁶² it was posited, "In every case that comes before this court, therefore where legislation of this (police) character is concerned and where the protection of the Federal Constitution is sought the question naturally arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty?" Due procedure is not immutable. "If the procedure under examination can be shown to preserve the fundamental characteristics and to provide the necessary protection to the individual which the Constitution was intended to secure its novelty will not vitiate it."⁶³ In *Hurtado v. California*⁶⁴ the new procedure of prosecution by information in lieu of indictment was declared valid as a "progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give from time to time new expression and greater effort to modern ideas of self-government." Due process in judicial procedure implies opportunity of hearing,⁶⁵ an impartial tribunal,⁶⁶ absence of fraud⁶⁷ and a court free from outside duress.⁶⁸ Due process does not guarantee fixed interpretation of laws by the courts⁶⁹ nor allow erroneous findings of facts to be upset by the appellate authority except as provided by law.⁷⁰ But rules of evidence and proceedings can be changed.⁷¹ No person has a vested right to a particular remedy. "The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with

59. See Swisher 'Growth of Constitutional Power in the United States', p. 107. See also "The changing role of the U.S. Supreme Court" in (1950) *Indian Law Review*, pp. 16-33.

60. *Chicago etc. R. Co. v. Chicago*, 160 U.S. 226.

61. *Pierce Oil Corp. v. Phoenix Refining Co.*, (259 U.S. 125).

62. 198 U.S. 45. 56.

63. Willoughby's 'Constitution Law,' Student Edn., p. 734.

64. 110 U.S. 516.

65. *Dartmouth College v. Woodward*, 4 Wh. 578. 581.

66. *Turney v. Ohio*, 273 U.S. 510.

67. *Chicago M. & St. P.R. & Co. v. Minnesota*, 134 U.S. 418.

68. *Frank v. Mangum*, 237 U.S. 309. 363.

69. *Thompson v. Kentucky*, 209 U.S. 340.

70. *Sauer v. New York*, 206 U.S. 536.

a specific and applicable provision of the Federal Constitution."⁷¹ The absence of provision of appeal in any case is not essential to due process.⁷² It was pithily put in *Pittsburgh etc. R. Co. v. Backers*,⁷³ "If a single hearing is not due process, doubling it will not make it so." In contempt proceedings, contempt in face of court can be dealt with by court without further proof.⁷⁴ But, if it is outside court due process requires that the accused shall be advised of the charges and given reasonable opportunity to meet them either by way of explanation or of defence.⁷⁵ Excessive penalties for an offence which make it practically impossible for the individual to test their validity by violating it is against due process.⁷⁶

Due process is implied in administrative proceedings where also notice and hearing is incumbent as in judicial proceedings. Due process also regulates public utilities affected with a public interest, as insurance, gasoline, oil pipe lines etc. (*vide* Art. 19, commentary). Due process is against excessive use of police power. Zoning and rent regulation, drugs etc. are exercised under police power of the state. Due process as applied to taxation implies that the tax be for a public purpose, uniform to all, against a person or property within the jurisdiction of the taxing authority. Notice and hearing are also needed in taxation proceedings. Due process implies fair and legal taxation, not excessive or arbitrary. Nor could it countenance double taxation. Due process and liberty (personal) go together. Compulsory vaccination,⁷⁷ sterilization of the insane and the feeble⁷⁸, regulation of labour contract,⁷⁹ proper laws of labour for women on account of their health and maternal duties,⁸⁰ proper hours of work in dangerous employments, regulation of labour of adult males,⁸¹ minimum wage laws,⁸² regulating employer's liability for compensation under Workmen's Compensation Act,⁸³ *Eminent Domain*⁸⁴—all these come under the scrutiny of the 'due process' doctrine.

As stated already in this commentary, in America it is not competent for the Congress to make any process a 'due process of law' by mere will. As stated in *Hurtado v. People of California*⁸⁵ "It is not any act legislative in form that is law. Law is something more than mere will exerted as an act of power. It typifies the general law of the land resting on settled and abiding principles. We may quote Daniel Webster's famous argument in the famous Dartmouth College cases.⁸⁶

"By the law of the land is most clearly intended the general law—a law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of the general

71. *Hurtado v. California*, 110 U.S. 516.

72. *McKane v. Durstone*, 153 U.S. 684.

73. 154 U.S. 421.

74. *Ex parte Tervy*, 128 U.S. 517.

75. *Cooke v. United States* 267 U.S. 517.

76. *Missouri Pacific R. Co. v. Tucker*, 230 U.S. 123.

77. *Jacobson v. Massachusetts*, 197 U.S. 11.

78. *Buck v. Bell*, 274 U.S. 200.

79. *Ritchie v. Illinois*, 155 I.U. 98.

80. *Holden v. Hardy*, 169 U.S. 366.

81. *Atkins v. Kansas*, 190 U.S. 207.

222.

82. *Settler v. O'Hara*, 69 or 519, *Ibid*, 243 U.S. 629.

83. *Arizona Copper Co. v. Hammar*, 250 U.S. 400.

84. *Fall Brook Irrigation District v. Bradley*, 164 U.S. 112.

85. (1884) 110 U.S. 516: 28 Law Edn. 232.

86. *The Trustees of Dartmouth College v. Woodward*, (1819) 4 Wheaton 518: 4 Law Edn. 829. See also *Davidson v. Board of Administrators of New Orleans*, (1878) 24 L. Edn. 616.

principles which govern society." As stated by Justice David:⁸⁷ "It is the birthright of every American citizen when charged with crime to be tried and punished according to law." This fits in with the English principle set out by Scrutton, L.J., in *Rex v. Secretary of State for Home Affairs*.⁸⁸ "A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction. It will be seen that in England 'due process of law' has been generally applied as 'protection against executive arbitrariness and Royal tyranny'. But in America it is a limitation upon all the powers of Government, legislative, executive and judicial. It often proved to be a veritable bulwark against all arbitrary legislation.

In a recent American Supreme Court judgment it was posited that the constitutional status which the resident alien enjoyed before voyage is not extinguished by the voyage. Any 'exclusion order' against him without hearing him will be denial of 'due process'.⁸⁹ Suspension of a medical practitioner for six months from practice on the score of a prior conviction is due process covered by the statute in question since the state can regulate professional conduct.⁹⁰

INDIA

Article 21 ensures that no person shall be deprived of his life or personal liberty except according to procedure established by law. This is not a limitation on the constitutional powers of the legislature but is in the nature of a restraint on the executive not to curtail personal liberty or life of a citizen except in accordance with law and procedure established by law. Article 22 contains the detailed provision in respect of 'deprivation of life or personal liberty' (*vide* Art. 22).

In the Irish Constitution we have an analogous provision in Art. 6 which states, "The liberty of the person is inviolable and no person shall be deprived of his liberty except in accordance with law." Article 31 of the Japanese Constitution is almost identical to Art. 21 of the Indian Constitution while Art. 74 of the Danzig Constitution also contains an analogous provision.

Comparison between America and India.—The Fifth and Fourteenth Amendments of the U.S. Constitution postulates, "No person shall be . . . deprived of his life, liberty or property without due process of law." It is appropriate to note the difference in the phraseology in Art. 21 of the Indian Constitution. There are three distinguishing features:

- (1) In Art. 21 the words are 'personal liberty' while in the U.S. Constitution it is 'liberty'.
- (2) In Art. 21 it is 'procedure established by law' while the U.S. counterpart has the words 'due process of law'. The word 'due' is omitted and 'established' is used in Art. 21. Instead of the word 'law' it is limited to 'procedure established by law' in Art. 21.
- (3) In the U.S. Constitution the protection offered is the same for 'property' as also to 'liberty'. In India personal liberty is guaranteed

87. *Ex parte* Mulligan (1886) 18 Law Edn. 281; 4 Wall 2.

88. (1923) K.B. 361 (quoted by Kania, C.J., in A.I.R. 1950 S.C. 27 (para. 20).

89. *Kwong Hai Chew v. Captain*

Seven Colding, A.I.R. 1955 N.U.C. 3508 (U.S.A.).

90. *Dr. Edward A. Barsky v. Board of Regents of the University of N.Y.*, (1954) 98 Law Edn. 829.

under Art. 21 while right to 'property' is treated differently in Art. 31 which declares that no person shall be deprived of his property save by authority of law, that any such acquisition under law shall also provide compensation to party deprived of property.

We shall now consider seriatim the connotation of the words in Art. 21 (1) 'personal liberty', (2) 'procedure established by law' in contrast to the American 'due process clause'.

Personal Liberty.—Edmund Burke defined 'liberty' as regulated freedom. Liberty in its broader concept includes the right not merely to move about unrestricted but extends also to any conduct, choice or action which the law allows and protects.⁹¹ Webster would describe liberty as "the creation of law, essentially different from the authorised licentiousness that trespasses on right. It is a legal and refined idea, the offspring of high civilization, which the savage never understands and never can understand."⁹² But liberty exists in proportion to wholesome restraint. The liberty of one means the restraint of another so as not to infringe on the rights of the former.

But in Art. 21 'liberty' is qualified by the word 'personal' and so what is guaranteed under Art. 21 is liberty in the narrower sense known as 'personal freedom' of the English law which in the words of Dicey⁹³ connotes "the right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification." This 'personal liberty' was again spoken of by Blackstone⁹⁴ as including "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law". Blackstone would ascribe three absolute rights in every Englishman, namely rights of personal security, personal liberty, and property. According to him 'personal security consisted in a "person's legal and uninterrupted enjoyment of his life, his limb, his body, his health and his reputation." In A. K. Gopalan's case⁹⁵ it was stated, "In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual; and personal liberty in this sense is the antithesis of physical restraint or coercion." In the opinion of Mukherjee, J.,⁹⁵ Art. 21 connotes: "This negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty has nothing to do with preventive detention in that the latter is wholly covered by Art. 22 (4) to (7) as a complete code on preventive detention." His Lordship would approve of a *via media* view: "Art. 21 to my mind gives protection to life and personal liberty to the extent therein mentioned. It does not recognize the right to life and personal liberty as an absolute right but delimits the ambit and scope of the right itself. The absolute right is by the definition cut down by the risk of its being taken away in accordance with procedure established by law. It is this circumscribed right which is substantially protected by Art. 21 as against the executive as well as legislature, for the Constitution has conditioned its deprivation by the necessity for a procedure established by the law made by itself. . . . Preventive detention deprives a person of his personal liberty as effectively as does punitive detention and therefore personal liberty, circumscribed as it is by the risk of its being taken away, requires protection against punitive as well

91. *Allegeyer v. Louisiana*, (1897) 165 U.S. 578.

92. Vol. 2, 393, 'Webster's Works.'

93. 'Constitutional Law', 9th Edn., pp. 207-8.

94. 'Commentaries on the Laws of England,' Book 1, p. 134.

95. *A. K. Gopalan v. State of Madras*, 1950 S.C.J. 174 (270): A.I.R. 1950 S.C. 27.

as preventive detention. . . . In my judgment Art. 21 protects the substantive rights by requiring a procedure and Art. 22 gives the minimum procedural protection."

Article 19 is not to be limited to free citizens only. The deprivation of personal liberty under Art. 21 may as well entail as a consequence the loss or abridgement of many of the rights under Art. 19 for the nature of these and not mere freedom to move to any part of the Indian territory. [Art. 19 (1) (d).]

In America the Supreme Court has given a very wide meaning to the term 'liberty'. There it includes not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into free contractual relations. In India the expression 'personal liberty' has been deliberately used to restrict it to freedom from physical restraint by incarceration or otherwise. 'Personal liberty' in Art. 21 does not mean only liberty of the person but it means liberty or the rights attached to the person (*Jus personam*). The expression 'freedom of life' or 'personal liberty' is not to be found in Art. 19 and it is straining the language of Art. 19 to squeeze in personal liberty into that article. We do not find Blackstone's conception of personal liberty in Art. 21. Article 19 protects some of the important attributes of personal liberty as independent rights while the term 'personal liberty' has been used in Art. 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men. (Per Das, J.). But the right is limited to the extent mentioned in Art. 21. The absolute right is by the definition in that article cut down by the risk of its being taken away in accordance with procedure established by law.

The effectiveness of Art. 21 as a guarantee has been withered down in a way by the decision of the Supreme Court in A. K. Gopalan's case. According to that decision if a legislature is competent to pass a law and there is no constitutional prohibition in respect of that it can then enact any law authorising the deprivation of personal liberty. Courts cannot then question the reasonableness of it. Thus stated Art. 21 appears to be no guarantee against legislative aggression upon individual liberty. It extends only a restraint upon the executive not to proceed against the life or personal liberty of any individual save under the authority of some law.

The decision in A. K. Gopalan's case seems to be *stare decisis* and the Supreme Court does not appear to be inclined to depart from the principles enunciated in it even in later cases, e.g. Atma Ram's case⁹⁶ and Ram Singh's case.⁹⁷

In effect Art. 21 merely guarantees a principle which was already clearly in vogue and cannot be characterised as any new advance in the matter of personal right to life or liberty.⁹⁸ Thus in the Nagpur High Court in an old case⁹⁹ Justice Niyogi posed the question, "Can it be reasonably said that because there is no express provision anywhere in the Government of India Act, 1935, affecting the personal liberty of the subject that it can be invaded otherwise than by authority of Law?" Again, in *Emperor v. Vimlabai Deshpande*¹ the principle was restressed that the state cannot interfere with the life or liberty of a person

96. (1951) S.C.R. 167; (1951) S.C.J. 208; A.I.R. 1951 S.C. 15; 55 Bom. L.R. 43.

97. (1951) S.C.R. 451; (1951) S.C.J. 374; (1951) 6 D.L.R. 245.

98. *Naranjan Singh v. State of Punjab*, A.I.R. 1952 S.C. 106.

99. *Sitao Jhola v. Emperor*, A.I.R. 1943 Nag. 36.

1. A.I.R. 1946 P.C. 123.

except in accordance with established law. A person prosecuted has a right to be heard in defence. This is pure natural justice applicable to all judicial proceedings.²

Comparative Analysis of Articles 19 to 22.—In A. K. Gopalan's case³ Patanjali Sastri, J., put it pithily giving a pen-picture analysis of Arts. 19 to 22, "Read as a whole and viewed in its setting among the group of provisions (Arts. 19 to 22) relating to 'Rights to Freedom', Art. 19 presupposes that the citizen to whom the possession of these Fundamental Rights is secured retains the substratum of personal freedom on which alone the enjoyment of these necessary rights necessarily rests. But whereas a penalty for committing a crime or otherwise the citizen is lawfully deprived of his freedom there could be no longer any question of his exercising or enforcing the rights referred to in Clause (1). Deprivation of personal liberty in such a situation is not within the purview of Art. 19 at all but is dealt with by the succeeding Articles 20 and 21."

"The point to be noted is that while Art. 19 guarantees to the citizens the enjoyment of certain liberties while they are free, Arts. 20 to 22 secure to all persons—citizens and non-citizens—certain constitutional guarantees with reference to punishment and prevention of crime." But this majority view was dissented by Fazl Ali, J., who felt that the addition of the word 'personal' before liberty in Art. 21 could not change the meaning of the words used in Art. 19; nor could it put a matter which was inseparably bound up with personal liberty beyond its place.

The constitutional safeguard in Art. 21 is only as against the State and its organs. It cannot certainly afford protection against infringements by the individuals or the executive.³ (*Vide* Patanjali Sastri, J.'s views).

While sub-clauses (2) to (6) of Art. 19 have put a limit on the fundamental rights of a citizen, Arts. 21 and 22 have put a limit on the power of the State given under Art. 246 read with the legislative lists. Per Das, J., "Under our Constitution our life and personal liberty are balanced by restrictions on the rights of citizens as laid down in Art. 19 and by checks put upon the State by Arts. 21 and 22."

His Lordship opined that it was wrong to suggest that in Art. 21 the enumeration of rights is such that free exercise of them was not possible in the absence of personal liberty. But right to hold property [Art. 19 (1) (f)] was not dependent on personal liberty.

Article 19 gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law, so that they may not conflict with the public welfare or general morality. But Arts. 20, 21, 22 are primarily concerned with penal enactments or other laws under which penal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which state control should be expressed. Article 19 uses the expression 'freedom' and mentions the several forms and aspects of it which are secured to individuals together with the limitations that could be placed upon them in the general interests of the society. Articles 20, 21 and 22 on the other hand do not make use of the expression 'freedom' and lay down the restrictions that are to be placed on state control where an individual is sought to be deprived of his life or personal liberty.⁴ (Per K. Mukerjee, J.).

2. *King v. Nelson*, (1835) 111 E.R. 624. *Wood v. Wood*, (1874) L.R. 9 Ex. 190.

3. 1950 S.C.J. 174 (270): A.I.R. 1950 S.C. 27.

4. *Ibid.*

Article 19 is a separate entity from Art. 21 and complete by itself. Kania, C.J., stated,⁴ "It seems to me improper to read Art. 19 as dealing with the same subject as Art. 21. Article 19 gives the rights specified therein, only to the citizens of India while Art. 21 is applicable to all persons. The protection given in Art. 21 is very general. It is of 'law' whatever that expression is interpreted to mean. The legislative restrictions on the law-making powers of the legislature are not prescribed in detail as in the case of the rights specified in Art. 19." Article 19 has nothing to do with preventive or punitive detention.

Article 19 only deals with certain particular rights which, in their origin and inception, are attributes of the freedom of the person but being of great importance are regarded as specific and independent rights. It does not deal with the freedom of the person as such.

Articles 19 and 21 are not complementary to each other. The former cannot be said to deal with substantive law merely nor Art. 21 with mere matters of procedure. The contents and subject-matter of the two provisions are not identical and they proceed on totally different principles. There is no mention of any right to 'life' in Art. 19 although that is the primary and the most important thing for which provision is made in Art. 21 (per Mukherjee, J.). The state's legislative powers are put in check by Arts. 21 and 22. The latter article by providing for preventive detention, recognizes that individual liberty may be subordinated to the larger social interests.

There is no justification to give the meaning of 'jus' to 'law' in Art. 21. The deliberate omission of the word 'due' from Art. 21 lends strength to the contention that the justiciable aspect of 'law' to consider whether it is reasonable or not by the court does not form part of the Indian Constitution. Article 21 is not a complete code. It has to be read as supplemented by Art. 22.

The expression 'deprived of life' refers not only to death but also to the various aspects of the freedom of the limbs and all the faculties by which life is enjoyed. In *Munn v. Illinois*⁵ Field, J., would ascribe to the term 'life' "something more than animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

It may be noted that the protection of Art. 19 is co-terminus with the legal capacity of a citizen to exercise the rights protected thereby, for sub-clauses (a) to (e) and (g) of Art. 19 (1) postulate the freedom of the person which alone can ensure the capacity to exercise the rights protected by those sub-clauses. As Das, J., put it,⁶ "The Constitution has recognized personal liberties as fundamental rights. It has guaranteed some of them under Art. 19 (1) but put restraints on them by clauses (2) to (6). It has put checks on the state's legislative powers by Arts. 21 and 22. It has by providing for preventive detention recognized that individual liberty may be subordinated to the larger social interests.

"While Art. 21 gives protection to life and personal liberty to the extent therein mentioned, it does not recognize the right to life and personal liberty as an absolute right but delimits the ambit and scope of the right itself.

4. *Ibid.*

5. (1877) 9 U.S. 113 (Dissenting

Judge Field).

6. A.K. Gopalan's case, *op. cit.*

The absolute right is by the definition in that Article cut down by the risk of its being taken away in accordance with procedure established by law. It is this circumscribed right which is substantively protected by Art. 21 as against the executive as well as the legislature, for the Constitution has conditioned its deprivation by the necessity for a procedure established by law made by itself. While sub-clauses (2) to (6) of Art. 19 have put a limit on the fundamental rights of a citizen, Arts. 21 and 22 have put a limit on the power of the state given under Art. 246 read with Legislative Lists. Under the Constitution the life and personal liberty are balanced by restrictions on the rights of the citizens as laid down in Art. 19 and by checks put upon the State by Arts. 21 and 22."

Kania, C.J., opined, "Reading Art. 21 as supplemented by Art. 22 the proper mode of construction will be that to the extent the procedure is prescribed by Art. 22, the same is to be observed. Otherwise Art. 21 will apply." Fazl Ali, J., put it that the correct position was that Art. 22 must prevail in so far as there were specific provisions therein regarding preventive detention, but where there were no such provisions in that Article, the operation of Arts. 19 and 21 could not be excluded. But Art. 22 was by itself a self-contained code of the law of preventive detention. As Mahajan, J., put it, "Art. 19 (5) is a saving and an enabling provision. It empowers Parliament to make a law imposing reasonable restriction on the right of freedom of movement while Art. 22 (7) is another enabling provision empowering Parliament to make a law on the subject of preventive detention in certain circumstances. If a law conforms to the conditions laid down in Art. 22 (7) it would be a good law and it could not have been intended that the law validly made should also conform itself to the provision of Art. 19 (5). One enabling provision cannot be considered as a safeguard against another enabling provision. Article 13 (2) can have absolutely no application in such a situation."

It is settled law as stated in Gopalan's case⁷ and affirmed in *Ram Singh v. State of Delhi*⁸ that any law providing for total deprivation of personal liberty cannot be challenged under Art. 19. It follows therefore that legislation providing for punitive or preventive detention cannot be challenged under Art. 19. It is suggested⁹ that Sec. 124A of the Indian Penal Code which provides three years' imprisonment offends Art. 19 (1) (a). The same may be said of Sec. 500, I.P.C. But in view of the Supreme Court decisions,^{7,8} where deprivation of liberty is caused by imprisonment, Art. 19 will not apply. If it were a case of fine only it might be different. As Mr. Chitlay states,¹⁰ "The majority view on Gopalan's case involves the position that Art. 19 is an exception to the rule that a 'law' under which personal liberty can be taken away must not contravene any Fundamental Right. But we wish to make it clear that the above discussion is only intended as an academic matter. As already stated, the law is settled on the point that any legislation providing for imprisonment, punitive or preventive, protective or otherwise, is outside the purview of Art. 19 and falls to be considered only under Art. 21."

Patanjali Shastri, J., would explain the matter thus in *Ram Singh's case*:¹¹

7. A.I.R. 1950 S.C. 27.

8. A.I.R. 1951 S.C. 270. *Vide also State of Punjab v. Ajaib Singh*, A.I.R. 1953 S.C. 10.

9. See W. Chitlay's 'Commentaries,'

Vol. I, pp. 511-573.

10. *Ibid*, p. 513.

11. *Ram Singh v. State of Delhi*, A.I.R. 1951 S.C. 270.

"The anomaly, if anomaly there be in the resulting position, is inherent in the structure and language of the relevant articles whose meaning and effect as expounded by this Court by an overwhelming majority in the cases referred to above, must now be taken to be settled law, and courts in this country will be serving no useful purpose by discovering supposed conflicts and illogicalities and recommending parties to regulate the point thus settled."

We feel that though as Mr. Chitlay would say it is an arguable point, to stress that a law which fines or imprisons for exercising a fundamental right (*e.g.*, right of speech, *vide* Secs. 124A and 500, I.P.C.), offends Art. 19, yet in view of other enabling provisions in Arts. 21 and 22 which govern the matter exclusively in the light of the Supreme Court decisions cited above, it is futile to further traverse the position. The rights in Art. 19 (1) (a) to (g) are also subject to the limitations set out in Art. 19 (2) to (6).

The jurisdiction of courts in applying this article can traverse the following:—

- (1) Whether the deprivation of life or personal liberty is under any law.¹²
- (2) Whether the procedure followed is in accordance with that prescribed under law.
- (3) Whether the essential requirements of the procedure are satisfied.
- (4) Whether the law is a valid law,¹³ passed by a competent legislature¹⁴ and not repugnant to any fundamental right.¹⁵

"Law".

The word 'Law' in Art. 21 means not only statute law but also the common or personal law. It means only 'positive or state-made law' and not the 'immutable and universal principles of natural justice'. Outside the realm of positive law there is no scope for the introduction in Art. 21 the doctrine of 'due process of law' even as regards procedure. As Kania, C.J., has put it, the word 'established' preceding 'law' suggests an agency which fixes the limits. This agency can be either the legislature or an agreement between the parties.

"Deprived".

The word 'deprived' indicates 'total loss'. The word 'restriction' which ordinarily implies 'partial restriction' can sometimes be total restriction, (*vide* Art. 19, Notes). In Art. 21 deprivation implies that the protection extends up to total loss of personal liberty.

"Procedure".

As Patanjali Shastri, J., has put it, Art. 21 presents an example of the fusion of procedural and substantive rights in the same provision. The right to live, though the most fundamental of all, is also one of the most difficult to define and its protection generally takes the form of a declaration that no person shall be deprived of it save by due process of law or by authority of law. 'Process' or 'procedure' in this context connotes both the act and the manner of proceeding to take away a man's life or personal liberty.

12. *A. K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27.

13. *Burma v. State*, A.I.R. 1951 Raj. 127.

14. *Rex v. Basudeva*, A.I.R. 1950 F.C. 67.

15. *Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27. (offending Art. 22). *Kalhi Raving v. State of Saurashtra*, A.I.R., 1952 S.C. 123 (offending Art. 14).

The expression 'procedure' means the manner and form of enforcing the law. In Art. 21 it signifies some steps or method or manner of proceeding leading up to the deprivation of life or personal liberty.

The word 'established' preceding 'law' and succeeding 'procedure' indicates 'fixed' or 'laid down'. 'Law' does not mean any indefinite principles of natural justice. The latter cannot in any sense establish a 'definite procedure'. Statute law alone rests on definite procedure in its application.

"Procedure established by law" in contrast to the American "due process" clause.

We have already discussed the 'due process' clause in the 5th and 14th Amendments of the American Constitution. We have seen how much it has been the subject of controversy, confusion and uncertainty. It had been so variously interpreted and has now come to mean 'reasonable law' and procedure according to the elusive and elastic standard of the majority of the judges disposing of a particular case. What is 'reasonable law' is to be assessed and this is done by two different approaches:

- (1) "Liberty being the rule and restraint the exception any new inroad upon the previous freedom which every enactment must necessarily imply, requires special jurisdiction according to the idea of reasonableness of the judges hearing. The case fails, the law should be declared unconstitutional."¹⁶
- (2) "There is a presumption that every legislation is valid and if facts could exist which would render the legislation reasonable the existence of those facts must be assumed by the court and the legislation declared valid."¹⁷

Dr. Ambedkar's Report.

The due process clause was particularly omitted in our Constitution as it would give more power to the judiciary than at present and as it may lead to needless confusion. Dr. Ambedkar has put it tersely as Chairman of the Drafting Committee of the Constituent Assembly,¹⁸ thiswise: "The question of 'due process' raises, in my judgment, the question of relationship between the legislature and the judiciary. In a federal constitution it is always open to the judiciary to decide whether any particular law passed by the legislature is *ultra vires* or *intra vires* with reference to the powers of legislation which are granted by the Constitution to the particular legislature. If the law made by a particular legislature exceeds the authority or the power given to it by the Constitution, such law would be *ultra vires* and invalid. This is the normal thing that happens in all federal constitutions. Every law in a federal constitution whether made by the Parliament at the centre or made by the legislature of the State is always subject to the examination by the judiciary from the point of view of the authority of the legislature making the law. The 'due process' clause in my judgment would give the judiciary the power to question the law made by the legislature on another ground. The ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary

16. *Adkins v. Children's Hospital*, 261 U.S. 525.

17. *Powell v. Pa.*, 127 U.S. 678. *Munn v. Illinois*, 94 U.S. 113; *U.S. v. Carolene Products Co.*, 304 U.S.

144. See N. R. Raghavachari, p. 102.

18. Constituent Assembly Debates, Vol. VII, pp. 999-1001.

would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law. The law may be perfectly good and valid so far as the authority of the legislature is concerned. But it may not be a good law, that is to say, it violates certain fundamental principles; and the judiciary would have the additional power of declaring the law invalid. . . . The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles.

"There are two views on the point. One view is this that the legislature may be trusted not to make any law which would abrogate the fundamental rights of man, so to say, the fundamental rights which apply to every individual, and consequently there is no danger arising from the introduction of the phrase 'due process'. Another view is that it is not possible to trust the legislature; the legislature is likely to err, is likely to be led away by passion, by party prejudice, by party considerations and the legislature may make a law which may abrogate what may be regarded as the fundamental principles which safeguard the individual rights of a citizen. We are therefore placed in two different positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusions. There are dangers on both sides. For myself, I cannot altogether omit the possibility of a legislature packed by partymen making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefore would not say anything. I would leave it to the House to decide in any way it likes."

The decision of the House went against the 'due process' clause and the insertion of the expression 'procedure established by law' was unanimously adopted.

Procedure Established by Law.

(1) What is guaranteed is 'procedure'.

(2) This procedure must be one 'established' by law. 'Law' means state-made or enacted law and not the general principles of natural justice, (*vide* A. K. Gopalan's case). There is no question of reasonableness or otherwise of the 'law' as Art. 21 affords no judicial review on the ground of reasonableness of a law. It also does not prevent competent legislative action on the field of substantive criminal law. By the expression 'procedure established by law' the Constitution has given the final word to the legislature to determine the law. The Supreme Court in A. K. Gopalan's case¹⁹ in so many words

approved of the limitations of the judiciary thiswise: "Our protection against legislative tyranny, if any, lies in the ultimate analysis in a free and intelligent public opinion which must eventually assert itself. . . . It is not for the court to question the wisdom and policy of the Constitution which the people have given unto themselves. It is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of the courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights."

Thus in India our Constitution has whittled down the protection offered to personal liberty by a meagre provision such as a guarantee of a procedure established by law. It is not even 'procedure according to law' as in Eire, Burma, etc. The Supreme Court in *A. K. Gopalan's* case has in the above words put the seal on it by blessing the principles governing Art. 21. While no doubt the 'due process' gives immense power to the judiciary yet we appear to err on the other extreme in India.

The reasonableness of a law could have been made justiciable. But that was not to be. The absurdity can be viewed thus: One of the fundamental principles of personal liberty is that no one should be detained without a trial and that too indefinitely. But under our Constitution the procedure in Art. 22 may be followed, and yet the legislature can enact a law permitting detention without trial for reasons of 'public order' (entry 3 of List VI). This is the result of words such as 'procedure established by law'. In the U.S.A. and Japan the constitution does not contain provisions permitting preventive detention much less laying down limitations on such right of detention in normal times, *i.e.* without a declaration of emergency. But in India preventive detention is a normal topic of legislation (even in peace times) in List 1, entry 9 and List III, entry 3.

In *A. K. Gopalan's* case the rejection of the doctrine of 'due process' in Art. 21 did not however lead to any uniform judicial opinion on the connotation of the word 'procedure established by law'. There were three views:

1. The first view is of Shastri, J., (p. 238 of 1950 S.C.J.):

"The word 'established' implies some degree of firmness and general acceptance while it does not exclude origination by statute. Hence procedure established by law did not mean any procedure that the legislature might be pleased to prescribe but the ordinary and well-established criminal procedure, *i.e.* those settled usages and normal modes of proceeding—(a sort of procedural due process) sanctioned by the criminal procedure which is the general law of criminal procedure in the country."

This view of Shastri, J., leads us to the position that there can be no change in such established procedural codes as the criminal procedure. There can be no *ad hoc* change of it for any special purpose. Any deviation from it or suspension of it will not, according to his Lordship, be the 'procedure established by law'. Thus the right of the accused not to be examined on oath under Sec. 342 (4), cannot be abrogated to the detriment of a particular person or persons unless the general law itself is changed. Shastri, J., felt such drastic changes would invite democratic opposition and that was the guarantee against legislative invasion of liberty intended by Art. 21. This view though it did

not introduce the 'due process' clause judicial review, at any rate, enlarged the scope of judicial scrutiny over departures from established procedure. In effect this was 'procedural due process' which may introduce all the elasticity of the American concept for judicial interference. Shastri, J., did not expressly state that he was in favour of only 'procedural due process' and not 'substantive due process'. The latter term would introduce the entire American doctrine which Dr. Ambedkar sought to avoid as Chairman of the Drafting Committee.

2. The second view was that of Mahajan, J. According to his Lordship 'procedure established by law' meant that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. It negatives the idea of fantastic, arbitrary and oppressive forms of proceedings" (p. 252 *ibid.*).

This view is rather general and does not bring in the essence of the word 'established'.

3. The other view is of Kania, C.J., (p. 186 *ibid.*): "Procedure established by law meant nothing more than the procedure prescribed by the legislature, for 'law' in the expression meant nothing but enacted law. Law has the same meaning in Arts. 21 and 31."

It may be pointed out here that in Art. 31 the words used are 'authority of law' while in Art. 21 it is 'procedure established by law'. Kania, C.J., does not view this as Shastri, J., and would give no special meaning to the word 'established' as connoting 'fixed, settled etc.'. The learned Chief Justice would see in the word 'established' the idea of an agency which fixes or settles. The agency according to him was the legislature and so it only means 'law enacted by the legislature' and cannot suggest any limitation upon the legislature as Shastri, J., visualized, *i.e.* legislature debarred from enacting new *ad hoc* any procedure other than what has been already established or fixed.

If the Irish precedent 'in accordance with law' had been incorporated in our Constitution instead of the Japanese-inspired 'established by law', we can certainly visualize the legislative supremacy adumbrated by Chief Justice Kania. As it is, the expression 'established by law' does not grant such legislative supremacy but on the other hand gives the judiciary scope to scan the competency of the legislature and the legality of the enacted law. According to Mr. Justice Shastri, it is even more, *i.e.* a sort of a judicial review over 'procedural due process'.

Mukherjee and Das, JJ., concurred with Kania, C.J., and said it all meant 'procedure enacted by State'; that such law must be a valid law and should not contravene Part III of the Constitution (Art. 20 or 22). This runs counter to Shastri, J.'s view and would not debar any *ad hoc* legislation made for a particular purpose on the ground that it was a departure from the usage or procedure so long 'established'.

Fazl Ali, J.'s dissenting judgment in A. K. Gopalan's case, took the view that 'law' in Art. 21 did not mean only state-made law but also included principles of natural justice, quoting Prof. Willis²⁰ four principles: (1) notice, (2) opportunity to be heard, (3) impartial tribunal, (4) orderly cause of procedure. But Fazl Ali, J.'s remarks cannot be authority since the majority of the Bench have held the view that 'law' means only statute law. A. K. Gopalan's case has been followed in subsequent cases which have continued to

hold that law is 'enacted law' and 'procedure established by law' is 'procedure prescribed by the legislature'.²¹ For rules of natural justice are rules of justice and not of law. It is safer to rely on a rule of law than on an uncertain rule of natural justice. Law as statute law is a surer protector of persons against illegal assault, etc. The miscreant can be better brought to book by definite rules of law than by abstract rules of justice. A state can run its affairs better with known rules of law and procedure than be subject to inchoate principles of natural justice which may vary in their application according to the nature of the presiding judges. The executive can be better kept under check if the rule of law is predominantly observed.

The Rule of Law.

In England the rule of law is pre-eminent. Parliament is the supreme law-making body which no one, not even courts, can question as regards legality of the laws so enacted. In America judicial supremacy is the keynote as it can test any legislation by its touchstone of 'due process'. The Indian Constitution strikes the golden mean. The legislature can operate in India only under the Constitution just as the judiciary and the executive, but the judiciary acts the role of the interpreter of the Constitution and thereby is a check on arbitrariness on the part of the legislature or the executive. Legislation in respect of personal liberty cannot transcend the guarantees of Arts. 20-22. But once the restrictive law satisfies Arts. 20-22, the court cannot question their legality or their reasonableness. While English courts cannot question Parliamentary law, in India the judiciary can (1) question the legislative competence,²² (2) declare a law unconstitutional as 'only a colourable exercise of legislative power', in other words a fraud on the Constitution.²³ If a law is passed in the interests of public order (entry 3, List III) that law should have a 'real and proximate connection with public order and not a fanciful and far off connection'.²³ But if there is no transgression of legislative power courts cannot question the wisdom and policy of the legislature.²⁴

Is 'Procedure' unchangeable?

We have seen procedure established by law is procedure that has been fixed or settled by legislation. Procedure is the manner and form of enforcing the law. In Art. 21 there is no guarantee of any particular procedure. No one can claim as of right any particular mode of trial or enquiry in a particular court of law. It is open to the legislature to act under entry 2 of List III to lay down any procedure but this should be subject to the constitutional provisions in Arts. 20 and 22. Special courts with special procedure in contradistinction to ordinary courts and ordinary procedure are allowable within the above limitations.²⁵ Thus the special courts functioning under Act XVIII of 1950 constituted under the Bombay Public Securities Act, 1947, and West Bengal Special Courts Ordinance, 1949 with special procedure have been in the main held to be *intra vires*.²⁶

21. *Jagjivan Rao v. The State*, I.L.R. (1952) Nag. 14. A.I.R. 1952 Nag. 116.

22. *Gopalan v. State of Madras*, (1950) S.C.J. 174 (187, 191) 305 & 272. See also *Megh Raj v. Alla Rakha*, (1942) 46 C.W.N. 61 (F.C.).

23. *Rex v. Basudeva*, (1950) S.C.J.

47.

24. *Lakshmi Narayan v. Prov. of Bihar* (1950), S.C.J. 32 (43) F.C.

25. *Union Colliery Co. v. Brejden*, (1889) A.C. 580, 585. *Vide* Special Criminal Courts (Jurisdiction) Act XVIII of 1950.

26.

In certain countries there is a guarantee to be tried in the ordinary courts of the realm.²⁷ But in the U.S.A. though there is no such specific bar to the creation of special tribunals there is the guarantee to the citizen of a jury trial and 'due process' clause which enables an 'indefeasible right of access to the ordinary court'.²⁸ In Eire Art. 38 (3) specifically allows creation of special courts where ordinary courts are found to be inadequate to secure "effective administration of justice and the preservation of public peace and order."

There is in our Constitution Art. 136 which enables a right of appeal to the Supreme Court from the judgment or order of any tribunal other than a military tribunal.

Normal and Abnormal Times.

The application of 'due process' or to the ordinary guarantee of individual liberties gets curtailed during times of war emergencies. We have seen already how in such a state of affairs when the security of state is threatened during war-time, the individual liberty gets subordinated to the greater liberty of the state. The decision in *Liveridge v. Anderson*²⁹ lays down the cardinal principles for such emergency situations. (*Vide ante* for full discussion).

But in normal times the liberty of the subject is sacrosanct and courts will refuse to act on any contrary presumption.³⁰

The interpretation of penal statutes must be based on the following cardinal principles:—

- (1) Any offence in a statute must be clearly stated without ambiguity. Ambiguity would only lead to a restriction of the offence.³¹ The benefit of ambiguity goes to the accused,³² and must always be construed so as not to lead to invasion of an individual's liberty.³³
- (2) The interpretation which will mitigate the penalty and not aggravate it should prevail.³⁴
- (3) Any omission in a statute or looseness of the language must always be construed in favour of the accused.³⁵
- (4) The legislative limitation of the powers of the executive to any particular purpose must be scrutinized by courts in favour of the liberty of the subject and a narrow construction limited by the words of the legislation is alone proper.³⁶
- (5) Any provision of law ousting the jurisdiction of courts will be strictly construed particularly when it affects the liberty of a

27. Switzerland 1874 (Art. 58); Japan 1946 (Art. 32); Chinese Republic 1946 (Art. 8, para 1); German Reich 1919 (Art. 105); Danzig 1922 (Art. 62).

28. *Ex parte Young*, (1908) 209 U.S. 123.

29. (1942) A.C. 206 (219).

30. *R. v. Holiday*, (1917) A.C. 260; *Marshall v. Blackpool Corpn.*, (1932) 1 K.B. 688; *Druce v. Beaumont Trust*, (1935) 2 K.B. 257.

31. *Elderton v. Totalistor Co.*,

(1945) 2 All. E.R. 624 (C.A.).

32. *D'Silva v. Emp.*, A.I.R. 1947 Bom. 310 (F.B.).

33. *R. v. Holiday*, (1917) 1 A.C. 260.

34. *Hildesheimer v. Faulkener*, (1911) 2 Ch. 552.

35. *Crawford v. Spooner*, (1847) 6 Moo P.C. 1. *R. v. Chapman*, (1931) 2 K.B. 606.

36. *Romesh v. Prov. of Bombay*, (1950) 5 D.L.R. 12 (14) Bom. *Eshugbayi v. Govt. of Nigeria*, (1931) A.C. 662.

subject.³⁷ Ouster of jurisdiction cannot be inferred. Express words are needed to oust jurisdiction.³⁸

- (6) All formalities laid down by a statute should be adhered to by courts.³⁹

Executive Acts.

The executive cannot transgress the law. They are bound to act in such a way as to be able to support the legality of their action.⁴⁰ The officer who executes an act must be empowered to do so⁴¹ and he should comply with all formalities laid down by law,⁴² and act honestly and not in fraud of a statute or *mala fide*.⁴³ These grounds for questioning the act of the executive cannot be barred by the statute itself.⁴³

Good Faith

Good faith has to be tested by courts—

- (1) as to whether the circumstances which necessitated the issue of the order did in fact exist. This is the 'objective' aspect;⁴⁴
- (2) as to whether the officer acted in good faith when he is the sole judge to decide the existence of circumstances which called for the order.⁴⁵ This is the 'subjective' aspect. Courts cannot question the reasonableness of the order but can declare the order void if it was the outcome of bad faith on the part of the officer.

Good faith can be found against, if there is a fraud on the statute or a 'colourable' use of it, e.g., where there is a misuse of a statute for a collateral purpose or other purpose than that for which it was intended.⁴⁶

Mala fide use of statutory powers to the detriment of a citizen's liberty had been discountenanced in the following cases:—

- (1) When the order of detention is a 'colourable' exercise of the alleged statutory power as, (a) where detention is a ruse for mere secret investigation into a crime contrary to provisions of the Criminal Procedure Code.⁴⁷ This was aptly put in *Bharatham v. Commissioner of Police* thus:⁴⁸

"When the detaining authority makes up his mind to detain a person who is alleged to have committed an offence then the detaining authority has made his choice and it would not be permissible to him to investigate the offence while still keeping the person under detention and not complying with the provisions of the law with regard to investigations.";

37. *Chester v. Bateson*, (1920) 1 K.B., 829.

38. *Paul v. Wheat Commrs.* (1937) A.C. 139.

39. *Jamal v. Emp.*, A.I.R. 1948 All. 225.

40. *Eshugbayi v. Govt. of Nigeria*, (1928) A.C. 459.

41. *Narayanamsami v. Inspector of Police*, A.I.R. 1949 Mad. 307.

42. *In re Rajadhar*, A.I.R. 1948 Bom. 334 (F.B.).

43. *K. Erup v. Sibnath*, (1945) 8 F.L.J. 222; *Basanta v. K. Erup*, (1944) F.L.J. 203.

44. *Liveridge v. Anderson*, (1942) A.C. 206.

45. *Gopalan v. State of Madras*, (1950) S.C.J. 174 (1952).

46. *Vimalabai v. Emperor*, I.L.R. (1945) Nag. 6.

47. *Vimlabai v. Emperor* I.L.R. (1945) Nag. 6.

48. A.I.R. 1950 Bom. 202.

- (b) where a person arrested under 107, Cr.P.C., is not proceeded against under the security proceedings but a *mala fide* detention under a subsequent order under the Preventive Detention Act is resorted to;⁴⁹
- (c) If a man detained under the Detention Ordinance of 1944 was being considered by the magistrate for being proceeded against under the Criminal Tribes Act, the prior order of detention cannot be termed a *bona fide* and valid order.⁵⁰
- (2) Where reasons stated for detention is outside the scope of the Act conferring the power.⁵¹ Where the detaining authority gives a number of good reasons but adds one reason for detention which is outside the ambit of the Act, the detention is illegal. The reason obviously is 'one cannot say what weighed with the detaining authority, the valid or the invalid reasons.'⁵²
- (3) Where the order of detention is in excess of the statutory power.⁵³
- (4) When a man is arrested on a specific charge, he cannot be detained under a security measure before he is tried for the prior charge and found innocent or guilty.⁵⁴
- (5) Where detention is restored to circumvent orders of bail issued by court or to secure an illegal extension of the period of imprisonment served by the prisoner.⁵⁵

The court has to see if the essential requirements of law and procedure established by law have been substantially satisfied.⁵⁶ Where a deprivation of personal liberty is against procedure established by law, the court will order release of the detenu.⁵⁷ Detention by executive order has to be tested by the principles laid under Article 22. In such cases *mala fides* of the Act can be tested.

Military Tribunals.

Article 33 confers on Parliament the power to modify the rights conferred by Part III of the Constitution in their application to armed forces. The liberty of the subject which is so well sought to be protected under civil law is available in a different form and procedure in proceedings before Military tribunals. Often the summary trials are farcical though expeditious. Enquiries in Military Tribunals may as well make a jurist ponder over the fundamental rules of natural justice. The supremacy of the law even in the areas under Martial Law is noteworthy. In the words of Mr. Justice Black in *Duncan v. Kahanamoku*,⁵⁸ "The phrase 'martial law' as employed in the Act, there-

49. *Kulomani v. The State*, A.I.R. 1951 Orissa 20.

50. *Baji Rao v. Emperor*, A.I.R. 1946 Bom. 32.

51. *Emperor v. Rajadhar*, (1947) 2 D.L.R. 556 Bom.

52. *Emperor v. Keshar*, 46 Bom. L.R. 22.

52. *Har Tirath v. The Crown*, A.I.R. 1950 E.P. 222. *Badri Prasad v. Shankar*, A.I.R. 1950 All. 709.

53. *Baji Rao v. Emperor*, A.I.R.

1946 Bom. 32.

54. *Kamalakant v. Emperor*, A.I.R. 1945 Pat. 354.

55. *Mani v. District Magistrate*, A.I.R. 1950 Mad. 162 (176). *In re Srinivasan*, A.I.R. 1949 Mad. 761.

56. *Makhan Singh v. State of Punjab*, A.I.R. 1952 S.C. 27.

57. *Maqbool Hussain v. State of Bombay*, A.I.R. 1953. S.C. 325.

58. 327 U.S. 304.

fore, while intended to authorize the Military to act vigorously for the maintenance of an orderly civil Government and for the defence of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of Courts by Military Tribunals."

Judicial Interpretation.

The personal rights guaranteed by sub-clauses (a) to (e) and (g) of Art. 19 (1) are in a way dependent on the provisions of Art. 21 just as the right guaranteed by sub-clause (f) of Art. 19 (1) is subject to Art. 31.⁵⁹ Under Art. 21 'procedure established by law' means procedure enacted by law made by the Union Parliament or the legislatures of the State.⁵⁹ Section 48 of the Revenue Recovery Act, 1864, or Sec. 46 (2) of the Income Tax Act do not violate Article 14, 19, 21 or 22 of the Constitution.⁵⁹ So if the Collector is satisfied that there has been wilful default by the assessee he can order arrest under Sec. 48 of the 1864 Act.

Where a girl was alleged to have been kidnapped and the accused was released on bail on the statement of the girl as to her age being over 22, and where the latter was thereupon arrested later to enable medical examination as to age, and to enable recording of a statement under Sec. 164 Cr.P.C. outside the influence of the accused, it was held that there was no justification to curtail liberty.⁶⁰ She was released forthwith.⁶⁰

The leading case *A. K. Gopalan v. State of Madras*⁶¹ has already been adverted to in the commentary under Art. 19 and Art. 21 (*supra*). Mr. A. K. Gopalan was detained under a preventive detention order under Act of 1950, which has been passed by the Parliament of India. The contention of the petitioner was the said impugned legislation abridged or infringed the rights given under Arts. 19-21 and that it was also not in accordance with the permissive legislation and preventive detention allowed under Art. 22 (4) and (7) and in particular was an infringement of Art. 22 (5). It was held that Sec. 14 of the impugned Act was *ultra vires* as offending Art. 22 (5), and as the Section was severable from the rest of the Act, the detention of the applicant under the Act was not illegal. We shall further deal with the Art. 22 (5) aspect later in the commentary under Art. 22. The observations in *A. K. Gopalan's* case covered Arts. 19, 21 and 22. Regarding Art. 21 the points enunciated can be categorically stated thus:

- (1) The word 'law' in Art. 21 has been used in the sense of state-made or enacted law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice (per Kania, C.J., and Sastri, Mukherjea and Das, JJ.).
- (2) Hence the expression 'procedure established by law' means the procedure prescribed by the law of the state. It is not proper to construe the expression in the light of the meaning given to the expression 'due process of law' in the American Constitution. 'Procedure established by law' does not mean procedure which has been sanctioned by settled usage or natural justice. (Per Kania, C.J., Mukherjea and Das, JJ.).

59. *Collector of Malabar v. Erimmal Ebrahim*, A.I.R. 1957 S.C. 688.

60. *Lalmuni Devi v. State*, A.I.R. 1957 Pat. 689.

61. (1951) 6 D.L.R. 313 S.C.; (1950) S.C.R. 88; (1950) S.C.J. 174; (1950) 2 M.L.J. 42; A.I.R. 1950 S.C. 27.

- (3) The court is not entitled to examine the reasonableness of a law which is validly made under Arts. 21-22. It is a valid law if it is enacted by a competent legislature and if it does not violate any of the fundamental rights declared by the Constitution.

This view of the matter practically reduces the ambit of justiciability to one of mere competence of the legislature. Prof. Bernard Schwartz in "A comparative view of the Gopalan's case"⁶² felt that this interpretation eliminated from the Indian law both the British concept of 'natural justice' and its American equivalent 'the procedural due process'. Though the view in Gopalan's case has been reiterated in subsequent cases⁶³ it may be usefully stated that the citizen might be assured at least a minimum guarantee against legislative encroachment upon individual liberty. But this could have been possible if the majority of judges had accepted Sastri, J.'s view to the effect that 'procedure established by law' means 'the basic principles which were at a given time already established by the general law of procedure'. It is yet possible for the Supreme Court to review the matter in some future cases where the exigency of a situation would compel them to accept Mr. Justice Sastri's view.

- (4) The 'law' referred to in Art. 21, however, must be valid law (Mukherjea, Fazl Ali and Dass, JJ.).
- (5) The object of Art. 21 is to prevent encroachment upon personal liberty by the executive save in accordance with law and in conformity with the provisions thereof (per Kania, C.J., Sastri and Mukherjea JJ.).
- (6) Personal liberty in Art. 21 means freedom from physical restraint of person by incarceration or otherwise. (Kania, C.J., Sastri and Das, JJ.).

It may be noted that Gopalan's case has been followed in subsequent cases. Thus it was held when Parliament changes procedure established by law by amending an existing law the procedure as changed by the amendment becomes the 'procedure established by law'. Thus in *Ram Singh's case*⁶⁴ it was clearly reiterated that a law which authorized deprivation of personal liberty did not fall within the purview of Art. 19 and that its validity was to be judged by the criteria contained in Arts. 21-22. In *Atma Ram's case*⁶⁵ it was posited that the necessity of an order of preventive detention in a case (sec. 3 of the Preventive Detention Act, 1950) was 'a matter of subjective decision of the Government and that cannot be substituted by an objective test of a court of law'.

In *Makhan Singh's case*⁶⁶ the Supreme Court held that Art. 21 also applied to preventive detention so far as Art. 22 was silent and that an order of preventive detention would be invalid if it was not strictly in conformity with the law which authorized the detention.

62. See Indian Law Review, 278 (293).

63. Mahajan, J., in *Krishnan v. State of Madras*, 1951 S.C.R. 621: (1952) 7 D.L.R. 1 (S.C.) A.I.R. 1951 S.C. 301: 1951 S.C.J. 453. *State of West Bengal v. Anwar Ali*, (1952) S.C.A. 148 (181).

64. *Ram Singh v. State of Delhi*, (1951) S.C.J. 374: (1951) 6 D.L.R. 245: (1951) S.C.R. 457.

65. *State of Bombay v. Atma Ram* (1951) S.C.R. 167: A.I.R. 1951 S.C. 157.

66. *Makhan Singh v. State of Punjab*, (1950) S.C.R. 88.

In *Dr. Ram Krishna Bharadwaj v. State of Delhi*,⁶⁷ the Supreme Court held that even if one of the grounds communicated to a person under detention, lacked the necessary particulars of disclosing the ground to the detenu, the latter's detention could not be held to be in accordance with procedure established by law within the meaning of Art. 21 and the detenu must needs be released.

In *Maqbool Hussain v. State of Bombay*⁶⁸ the Supreme Court held that "the scheme of Punjab Communist Detenu Rules 41 was to constitute the Jail Superintendent only an administrative authority to maintain jail discipline and inflict summary punishment on the detenus for breach of the discipline by committing a jail offence. It is only when the Jail Superintendent considers that the offence is not adequately punishable by him that he can send the case to the magistrate. If he actually himself punishes, he cannot again under this rule refer the case to the magistrate. A reference by him after punishment will be wholly unauthorized and without jurisdiction and the prosecution before the magistrate would be illegal and not in accordance with procedure established by law as outlined in Art. 21."

In *Jaggiwan Ram v. The State*⁶⁹ the Madhya Pradesh Public Security Measures Act XXIII of 1950 was held to be *intra vires* of Art. 21, that 'law' in Art. 21 meant only State-made or enacted law and not 'general principles of natural justice'. Procedure established by law also meant only procedure prescribed by the legislature and Art. 21 could never be construed as a constitutional limitation on the powers of the legislature already conferred by the Constitution.

In *Ajaib Singh v. State of Punjab*⁷⁰ a case under the Abducted Persons (Recovery and Restoration) Act, 1949, Khosla, J., observed that "procedure established by law in Art. 21 means only procedure laid down by law or the procedure prescribed by Art. 22 and there is nothing inconsistent in the impugned Act which is contrary to Art. 21 or 22. . . . The entire procedure under the Act is not unjust or improper. The case is examined by a tribunal consisting of a Superintendent of Police from India and a Superintendent of Police from Pakistan who may be expected to deal with the question of the abducted persons' status justly and impartially. There is nothing fundamentally wrong or improper in entrusting the decision of this question to a tribunal of this nature and the prohibition in regard to interference by law courts is not by itself contrary to the principles of natural justice. Apart from the conflict with Art. 22 there is nothing unreasonable in the procedure laid down by the Act for the recovery and restoration of abducted women." This view of Khosla, J., was affirmed by the Supreme Court in appeal.⁷¹

In *Ansumali v. State of West Bengal*⁷² it was held that under the existing law persons returned as members of a State Legislative Assembly or Council of State could not claim immunity from arrest for preventive detention. Articles 21 and 22 did not exempt members of either house of legislature and applied to all. Nor did preventive detention disqualify a candidate from standing for election to Parliament.

In *Burma v. State*⁷³ it was held that the extradition treaty between the former Dholpur State and the British Government not having been incorporated

67. A.I.R. 1953 S.C. 318.

68. A.I.R. 1953 S.C. 325.

69. A.I.R. 1952 Nag. 118.

70. A.I.R. 1952 Punj. 309.

71. *State of Punjab v. Ajaib Singh*,
A.I.R. 1953 S.C. 10.

72. A.I.R. 1952 Cal. 632.

73. A.I.R. 1951 Raj. 127.

into the law of that State by legislative enactment could not be regarded as part of the Municipal Law of Dholpur State and the detention of person under the provisions of such treaty could not be said to be according to procedure established by law within the meaning of Art. 21, and as such was invalid. The practice of surrendering fugitive criminals in accordance with the treaty followed by the Dholpur State till its merger could not be deemed to be a law that could be continued under Art. 372.

In *Parsuram Das v. State*⁷⁴ it was held that since the time limits fixed in Secs. 9 (1) and 10 (1) were not complied with, it could not be held that the detention was in accordance with the procedure established by law. There was a clear violation of the fundamental right guaranteed under Art. 21 which invalidated the subsequent detention even if it be held that the detention orders were valid in their inception.

In *Hari Prasad v. State of Assam*⁷⁵ it was held that no person should be deprived of his life or liberty except according to procedure established by law as prescribed under Art. 21. The burden is therefore on the Government to show that the orders of detention in particular cases are perfectly valid and in strict adherence to the law as laid down. Reliance was placed in this case on *Kishori Lal v. The State*⁷⁶ where it was held that where a detenu's case was considered only by two members and not by all the members of the Advisory Board as laid down in the Preventive Detention Act of 1950 it followed that the procedure established by law was disobeyed and under Art. 21 the detenu was entitled to be forthwith released.

In *Ismail v. State of Orissa*⁷⁷ Secs. 2 (1) (b) and (3) of Orissa Maintenance of Public Order Act X of 1952 was held void as contrary to Art. 21 in so far as it did not provide for the essentials of a legal procedure.

In *Mahammad Athar Rizvi v. State*⁷⁸ it was held that what was procedure established by law had been left to the legislature which could legislate the procedure and fix the limit of its application. Further it was not necessary that every detailed step of the procedure need be mentioned. In Preventive Detention Act one of the conditions of Sec. 3 should exist for passing an order of detention. As to how and by what process satisfaction should be arrived at must needs be chalked down by the legislature. The method and extent of satisfaction was entirely left to the discretion of the authority making the order.

In *re Pandurang*⁷⁹ it was held that courts should see that not only was the order of detention valid but there must also be a substantial compliance with all the provisions of the statute. The original order of detention might be valid but if the court found that the deprivation was continued contrary to the procedure established by law, the court must hold that Art. 21 had been violated.

In *Brahmeshwar Prasad v. State of Bihar*⁸⁰ it was held that as the Bihar Maintenance of Public Order Act, 1950, was declared *ultra vires* of Art. 22, detention of a person under Sec. 2 (1) (a) of the Act was illegal after 26th Jan. 1950 as Art. 21 was violated thereby. Similarly, in *Harpal Singh v. The State*⁸¹

74. A.I.R. 1952 Orissa 208.

75. A.I.R. 1952 Assam 187.

76. A.I.R. 1951 Orissa 86.

77. A.I.R. 1951 Orissa 86.

78. A.I.R. 1951 All. 645.

79. A.I.R. 1951 Bom. 30.

80. A.I.R. 1950 Pat. 261.

81. A.I.R. 1950 All. 562.

Sec. 123A of Cr.P.C. (U.P. Amendment) was held unconstitutional after the Constitution came into force as offending Arts. 21 and 22.

In *Mohammad Razvi v. State of Hyderabad*⁸² it was held that since the Nizam had delegated full power to the Military Governor and a validating regulation passed on 6th Oct., 1949 cured the defects in the proceedings there could be no question of Art. 21 of the Constitution being infringed as the validating regulation was as much law as the regulation appointing a tribunal.

In *Abdul Khadar v. State of Mysore*⁸³ it was held the term 'procedure' was not used in its technical sense meaning civil and criminal procedure code, but it was employed in a general sense to mean the steps taken in an ordinary trial and that there was no vested right to any particular form of trial or procedure.

In this view the Mysore Special Criminal Courts Act XXV of 1942 was held *intra vires*, since procedure established by law only meant law of the land having statutory origin.

In *Venkatraman v. Commissioner of Police, Madras*,⁸⁴ the principle enunciated in Art. 21 was reiterated and it was further stated that whereas deprivation of life or personal liberty in future could be done only in accordance with the procedure established by law, *i.e.* by legislative enactments either by Parliament or by State legislature in accordance with the division of functions in the Seventh Schedule, yet in so far as preventive detention was concerned, Art. 22 prescribed what ought to be the procedure established by law. In the instant case Secs. 2 (1) (a), 3, 4, 4A and 15 of the Madras Maintenance of Public Order Act XXIII of 1949 were held *ultra vires* of Arts. 21 and 22. Mr. Justice Govinda Menon, however, observed in the case that the expression procedure established by law meant a procedure fixed in accordance with the legislative enactment passed by Parliament and the State legislature which did not offend or was revolting to, notions and ideas of dignity of the human being and was neither indecent, unconscionable or repugnant to civilized beliefs.

In *S. P. Jaiswal v. The State and another*⁸⁵ it was held that a High Court could scan the procedure and evidence in the lower court to see if Art. 21 had been violated. No hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction under Sec. 561A, Cr.P.C., of questioning the proceedings at any stage. If it is brought to the notice of the court that manifest injustice will result the court will exercise its extraordinary powers; the court can go into the evidence on the basis of which the prosecution has brought a charge and find whether that evidence will support the case which is sought to be made out against the accused.

In *Raj Bahadur v. Legal Remembrancer to the Government of West Bengal and others*⁸⁶ it was held that the Bengal Suppression of Immoral Traffic Act 6 of 1933 was not an enactment repugnant to any provision in the Constitution. The scheme of the Bengal Act is to provide for salvage of such children as are being exploited or are likely to be exploited for immoral purposes. Article 23 provides for prohibiting traffic *inter alia* in human beings

82. A.I.R. 1951 Hyd. 97.

85. A.I.R. 1953 Punj. 149.

83. A.I.R. 1951 Mys. 72.

86. A.I.R. 1953 Cal. 522.

84. A.I.R. 1951 Mad. 1015.

which would include traffic in women and children for immoral or other purposes. Thus the instant Bengal Act is not *ultra vires* of either Art. 21 or 22.

In *Abdul Munim Khan v. State of Hyderabad*⁸⁷ the Hyderabad Special Tribunals Regulation (5 of 1308 Fasli) was upheld as *intra vires* of Arts. 14, 21 and 25 as the procedure was one prescribed by law, i.e. the instant Regulation.

In *Gopal Umed Singh Narubha v. State*⁸⁸ it was held detention for more than three months was a violation of Art. 22 (4) and a breach of procedure established by law under Art. 21.

In *Shiva Nandan v. State of West Bengal*,⁸⁹ Regulation 881 of the Police Regulations of 1943 which provide for compulsory residence in the lines unless specially exempted and presence in the lines from Retreat to Reveille and attendance at all parades and roll calls during 24 hours, was held to be *intra vires* of Art. 21. The case in *Ram Gopal v. King Emperor*⁹⁰ was distinguished in that the confinement directed in that case was for an unlimited period and as such it was contrary to Sec. 7 (b) of the Police Act, 1861.

In *Maheshwari Devi Jute Mills Ltd., Kanpur v. Labour Appellate Tribunal*⁹¹ it was held that it was not for the court to question the wisdom and policy of the Constitution. By adopting the phrase 'established by law' in preference to 'due process of law' the Constitution gave the legislature the final right to determine a law when acting within the jurisdiction assigned to it.

In *Iqbal Ahmed v. State of Bhopal*⁹² Sec. 7 of Influx from Pakistan (Control) Act, 1949 was held *intra vires* of Art. 22. Where a person is arrested in enforcement of the direction in an order under Sec. 7 of the Act 23 of 1949 for the purpose of removal from India and he is informed of the order of the Government at the time of the arrest, it was pointed in the instant case that Art. 21 did not apply and that there was substantial compliance with the provisions of Art. 22.

In *Prem Dutta v. Superintendent, Central Prison*,⁹³ it was stated that where grounds for detention had been mixed up with vague, indefinite and bad grounds the petitioner's detention could not be held to be in accordance with the procedure established by law within the meaning of Art. 21 as the constitutional requirement with respect to each of the ground communicated to the person detained subject to a claim of a privilege under clause (6) of Art. 22 was not satisfied.

The Abducted Persons (Recovery and Restoration) Act, 1949 does not infringe Art. 22 (1) and (2) of the Constitution nor does it violate Art. 19 (1) (d) (e) and (g) and Art. 21.⁹⁴

In *A. S. Krishna in re*⁹⁵ it was pointed out that though in Sec. 53 of the Prohibition Act it was provided that nothing in the Act should affect the operation of the Criminal Procedure Code and it was found that the procedure presented in the Prohibition Act was slightly different from that in the Code of Criminal Procedure, such a procedure would not be invalid as Sec.

87. A.I.R. 1953 Hyd. 145.

88. A.I.R. 1953 Sau. 51.

89. A.I.R. 1954 Cal. 60.

90. 2 C.L.J. 616.

91. A.I.R. 1954 All. 161.

92. A.I.R. 1954 Bhopal 9.

93. A.I.R. 1954 All. 315; A.I.R. 1953 S.C. 318 followed.

94. *Ram Singh Narain Singh v. Union of India*, A.I.R. 1954 Punj. 145.

95. A.I.R. 1954 Mad. 993.

1 (2) of the Code exempts special procedures in special laws. It was therefore held in the instant case that there was no violation of Art. 21 at all.

In *Umrao Mal v. State of Rajasthan*⁹⁶ it was clearly pointed out that it could not be too often emphasised that for a person to be deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected.

Where the grounds supplied to the person detained are vague and indefinite the detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 of the Constitution.⁹⁷ Particulars of grounds, even if denied for one of them as prescribed in Art. 22 (5) offends the guarantee of procedure established by law as vouchsafed in Art. 21.⁹⁸

When bail is ordered by court on Saturday and there was no impediment for taking the bail bond that day itself, departmental delay in letting him free only on Monday is a grossly illegal detention of an accused offending Art. 21.⁹⁹ Departmental instructions preventing release on a Sunday is illegal.⁹⁹

There is nothing in the Constitution which provides that the legislature has got no power to make provision if some irregularity is committed in the procedure laid down for the trial. Merely because Art. 21 protects the life and liberty of a person except when it is deprived according to procedure established by law, Sec. 537, Cr.P.C., the curing provision under certain specified conditions, cannot be said to contravene Art. 21.¹ For Sec. 537 cures only some patent errors such as error in complaint, summons, warrant, order, judgment etc., error or omission or irregularity in the charge, including any misjoinder of charge, misdirection in any charge to a jury unless the latter occasions a failure of justice etc. If the accused fails to take the objection earlier, it will be deemed that the error has not occasioned any failure of justice.

The presumption raised under Sec. 114 and illustration (a) to the section in the Indian Evidence Act in no way offends Art. 21. The phrase 'procedure established by law' in Art. 21 shows that it relates to statute-made law—Whether the Law of Evidence is procedural or otherwise it is a statute-made law and therefore is not hit by Art. 21.²

The gist of an offence under Sec. 15 (b) of the Madras General Sales Tax Act, 9 of 1939 is an assessment under the Act and the failure to pay within the time allowed, any tax so assessed. When both these elements are proved and in fact admitted on the wording of the section, there is no scope for an enquiry, as to the validity or the propriety of the assessment. Sec. 16A precludes such an enquiry. Both Sec. 151 (b) and Sec. 16A are not repugnant to Art. 21, or to the Criminal Procedure Code or to the principles of natural justice.³

In *Lakshmi Devi v. State*⁴ a kidnapped girl was produced in pursuance of search warrant under Sec. 100, Cr.P.C., and she was remanded to custody to enable medical examination as to her age, to record her statement under

96. A.I.R. 1955 Raj. 6.

97. *Ghulam Quadir Hawabaz v. State*, A.I.R. 1955 J. & K. 35.

98. *Abdul Ghani Gori v. State*, A.I.R. 1955 J. & K. 38.

99. *Kulandan Velan Chettiar v. Ayinam Chettiar*, 1 M.L.J. 469:

1956 M.W.N. 197: A.I.R. 1956 All. 689.

1. *Ram Kishan v. The State*, A.I.R. 1956 All. 462: C.L.R. 1956 All. 254.

2. *The State v. Prakash Singh*, A.I.R. 1956 Punjab 224.

3. *State of Kerala v. P. Krishnan*, A.I.R. 1958 Ker. 55: I.L.R. (1957) Ker. 873.

4. A.I.R. 1957 Pat. 689.

Sec. 164 when she was beyond the influence of the accused, and to avert breach of the peace. The girl claimed to be 21 years of age and moved an application under Sec. 491, Cr.P.C., and Art. 226. It was held that her detention was in violation of Art. 21, that there was no *prima facie* case for remand under Sec. 100, Cr. P.C., and that breach of the peace could be averted by applying Sec. 107, Cr.P.C. Medical evidence also showed she was above 18 years and she was set at liberty under Sec. 552, Cr.P.C.⁴

Sec. 25 of The Drugs Act (1940) is 'intra vires' of Art. 21.

A reading of Sec. 25 makes it clear that the report of a chemical analyst is to be held conclusive only if it is not challenged according to the procedure given in the section. It is open to the accused to rebut the report and it is open to a court to reject it, if the rebuttal is satisfactory. Thus although the legislature has denied the right of cross-examination to an accused and has also made the report admissible in evidence without the Government Analyst deposing on oath, it has nevertheless provided an alternative procedure by which an accused can defend himself. Section 25, therefore, is *intra vires* of Art. 21.⁵

Art. 22. "(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

(3) Nothing in clauses (1) and (2) shall apply—(a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are or have been or are qualified to be appointed as judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority

making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe:

(a) the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

FOREIGN CONSTITUTIONS.

America (U.S.A.)

The 6th Amendment runs:

"In all Criminal prosecutions the accused shall enjoy the right to a speedy and public trial, and to be informed of the nature and cause of the accusations, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."

Japan

Art. XXXIV of the 1946 Constitution states:

"No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel."

COMMENTARY ON FOREIGN CONSTITUTIONS

The law of preventive detention is a limitation on the freedom of personal liberty. Even in the Constitution of the U.S.S.R., Art. 127 postulates: "Citizens of the U.S.S.R. are guaranteed inviolability of the person. No person may be placed under arrest except by a decision of a Court or with the sanction of a procurator." The Republican Czechoslovakia Constitution of 1948 postulates in Art. 38: "The law shall determine what restrictions may be imposed on civil rights and liberties in times of war or when events occur which threaten the independence, integrity and unity of State, the Constitution, the Republican form of Government and the public democratic system or public peace and order."

Thus we see rarely a direct provision in the foreign constitutions for preventive detention, i.e. detention of a citizen without trial. We hear of *habeas corpus* proceedings in England as an antidote for illegal arrest or detention. There are of course suspension of these freedoms in many countries during national emergencies or war conditions. But in India we have even

during peaceful times a limitation put upon the freedom of personal liberty by this doctrine of preventive detention. No other country in the world has made preventive detention an integral part of their constitution. In India personal liberty is sought to be conditioned by two guarantees in—

1. That it shall be deprived only according to procedure established by law (Art. 21).

2. The arrested person shall be given an early trial subject to the exceptions and procedure detailed out in Art. 22 which is as it were a code on the law of 'preventive detention.'

The Japanese model has been in a way comprised and accepted in Art. 22. The American law is less stringent. But both the countries have not used this weapon of 'preventive detention' against a subject citizen. India alone is unique in this regard.

We shall now study the American and English law on the subject analogous to the ordinary law set out in clauses (1) and (2) of Art. 22, since there is no special law of "preventive detention" as such [Art. 22 (3 to 7)] in those countries.

U.S.A.

The 6th Amendment commends a speedy trial. This in effect means trial at a reasonable speed quite consistent with due course of justice.⁶ But this 6th Amendment has not been much controverted in the Federal Courts so much so that no case of its violation has reached the Supreme Court. The Amendment advocates public trials. But when the accused are not otherwise prejudiced and in exceptional cases where public morals seem to require it, exclusion of spectators from the trial had been resorted to.⁸ In every case the court must allow reasonable time to the accused to secure the aid of counsel.⁹ The furnishing of legal aid is proof of the doctrine of equal protection of laws, and equality in law. Often complicated procedure or the need to combat prosecution's onslaught necessitate the aid of counsel the absence of which may result in injustice. This will be fundamentally unfair. "The accused must have legal assistance under the 6th Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not." Only a waiver of counsel understandingly made, justifies trial without counsel.¹⁰

The choice of counsel is for the accused. In capital cases if he does not engage counsel it is the duty of court to employ counsel and give him opportunity and facility to take all instructions.¹¹ In cases other than involving capital offences absence of counsel does not vitiate trial unless it has caused fundamental unfairness.

England

In England the trinity of powers, the Parliament, the Executive and the Judiciary, are enjoying in effect a separation of powers and have evolved themselves into perfected machinery despite the want of a written constitution. Preventive detention is one of the powers allowed to the executive used in the interests of the welfare of the community. But there are safeguards provided

6. *Beavers v. Haubert*, (1905) 198 U.S. 77 (87).

7. See Willoughby's 'Constitutional Law of U.S.A.', Student Edn., p. 470.

8. See *Gains v. Washington*, 277 U.S. 81, 85, 86.

9. *Powell v. Alabama*, (1932) 287 U.S. 45.

10. *Uveges v. Pennsylvania*, (1948) 335 U.S. 437.

11. *Powell v. Alabama*, (1932) 287 U.S. 45.

lest the power be abused. Dicey's orthodox conception was (1) "the physical restraint of an individual may be justified only on the ground that he has been accused of some offence and must be brought before the court to stand his trial; (2) that he has been convicted of some offence and must suffer punishment for it." But after the decisions in *Rex v. Halliday*¹² and *Liveridge v. Anderson*,¹³ it is settled law "that Parliament may empower the executive to make regulations for the detention without trial of persons whose detention appears to be expedient in the interests of the public safety or the defence of the realm".

During the First World War, national emergency required Parliament to pass the Defence of the Realm Consolidation Act in 1914 followed by a number of Regulations including Regulation 14-B which permitted the Secretary of State to subject any person "to such obligations and restrictions as hereinbefore mentioned in view of his hostile origin or associations". The matter was ultimately brought before the House of Lords in *Rex v. Halliday*. Lord Shaw felt the Act to be a violent exercise of "arbitrary power" and that the prisoner had been "regulated out of liberty" but the majority of Lords pronounced the Regulations as necessary for the public safety in a time of danger. Lord Finlay, L.C., felt, "One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restrictions on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy (p. 269). Preventive detention is not a punitive but a precautionary method. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it."

But Lord Atkinson stated, "If the legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned that enactment and orders made under it if *intra vires* do not infringe upon the Habeas Corpus Acts or take away any right conferred by Magna Carta" (p. 272).

The matter was again trotted out in *Ronn-feldt v. Phillips*¹⁴ where a regulation under the Defence of the Realm Regulations enjoined upon a person not to reside in a particular locality since the military authority suspected him of acting in a manner prejudicial to public safety. Lord Justice Scrutton observed in his judgment, "The courts were always anxious to perfect the liberty of the subject. They did so both in the interests of the subject and in the interests of the state. It has been said that the war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Carta." Thus gradually in the English law in almost every regulation or law made during war, the paramount interests and security of the state struck the predominant note. Bailhache, J., struck the keynote in *R. v. Superintendent of Vine Street Police Station Ex parte Libman*,¹⁵ when he said, "Above the liberty of the subject is the safety of the realm and if the internment of an alien enemy is considered by the executive Government charged with the protection of the realm, desirable in the interests of the safety of the realm, the action of the Government in so doing is not open to review by the courts of law by Habeas Corpus." Lord Parker said in *Re Zamora*,¹⁶ "Those who are responsible

12. (1917) A.C. 260.

13. (1942) A.C. 206.

14. (1918) 35 T.L.R. 46-47.

15. (1916) K.B. 275.

16. (1916) 2 A.C. 77 at 107.

for the national security must be the sole judges of what the national security requires."

Even apart from war emergencies we find in *Hudson Bay Co. v. Macclay*¹⁷ a regulation empowering the Shipping Controller to give direction as to the use of the ships and to prohibit any ship from putting to sea without his licence was held *intra vires*. Greer, J., stated, "Under the circumstances such as these, the notion that there is any effective presumption that Parliament did not intend to interfere with the liberty or property of the subject becomes so thin as to disappear altogether when we find in the statute express words which show that the legislature expressly authorized a particular regulation which would of necessity restrict the liberty of the subject and his freedom to enjoy his normal rights over his real and personal property."

The Second World War necessitated the passing of the Emergency Powers (Defence) Act of 1939 which gave power to the executive to make regulations for purpose of public safety, defence of the realm, maintenance of public order, trial and punishment of persons offending against the regulations and detention of persons "whose detention appears to the Secretary of State to be expedient in the interests of the public safety for the defence of the realm, etc." Soon after, the matter of 'detention powers' came to a final determination in the leading case *Liveridge v. Sir John Anderson*.¹⁸ Liveridge, a detenu under the regulations, filed a suit for the declaration that his detention was unlawful and for false imprisonment. In the suit he applied for particulars of the grounds on which the respondent had reasonable cause to believe the appellant to be a person of hostile associations and of the grounds on which the respondent had reasonable cause to believe that by reason of such hostile association it was necessary to exercise control over the appellant. The House of Lords held that the Secretary of State could not be compelled to furnish the appellant the grounds of detention and a valid order of detention was *prima facie* answer to any action for damages and false imprisonment. The burden was on the appellant to prove the order to be invalid. Lord Macmillan observed in the case:

"In a time of emergency, when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace-time measure. . . . The Liberty which we so justly extol is itself the gift of the law and as Magna Carta recognises, may by the law be forfeited or abridged. At a time when it is undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter of surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention. . . . It is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause to believe and he cannot, if he has acted in good faith, be called upon to disclose to any one the facts and circumstances which have induced his belief or to satisfy any one but himself that these facts and circumstances constituted reasonable cause to believe."¹⁹ Lord Atkin, however, recorded a strong dissenting note: "In England amidst the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace.

17. (1920) 36 T.L.R. 469, 475.

18. (1942) A.C. 206.

19. See also *Greene v. Secretary*

of State for Home Affairs,
(1942) A.C. 284.

It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority, we are now fighting that judges are no respectors of persons and stand between the subject and any attempted encroachments of his liberty by the executive, alert to see that any coercive action is justified by law." The majority view was that the words 'reasonable cause' cannot be construed as imposing an objective condition precedent of facts on which a person detained would be entitled to challenge the grounds of the Secretary of State's honest belief; in short that the condition is subjective and not objective. Lord Atkin, however, felt it was an objective test to be conducted by an independent tribunal of the reasonableness claimed for the conduct impugned. In an earlier case²⁰ the same judge had observed:

"In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

In England at Common Law an accused has a right to be defended by counsel. This was so recognised by Statutes of 1695 in cases of treason. Later by the 1836 statute it was extended to summary offences and charges of felony. The Poor Prisoners' Defenders' Act, 1930, then provided legal aid to poor accused at public expense. The 1949 Legal Aid and Advice Act established a fund partly contributed by the State out of which certified poor litigants having income below a given minimum (£420 per annum) were assured of legal aid through a local committee. All this effort indicates that the state and society of England recognize the freedom of the individual and his liberties, personal and proprietary; that each will be given due and equal protection in law and towards that end free legal aid is to be afforded to the less fortunate members of the society. The right to have counsel appointed by court is absent but the right of even a poor man to engage counsel is assured and facilitated.

The principal safeguards available to an accused in England have been summarised thus:²¹

1. The writ of Habeas Corpus ensures that he will be tried within a limited time or released. He cannot be kept in a dungeon for years while the police torture him into confession or wait for Providence to send further evidence against him.
2. In a reasonable time before trial, a charge must be laid against him. It must set out a specific offence alleged to be committed on a specified date and at a specified place.
3. He must have ample time to prepare his defence.
4. He is entitled to expert assistance of a lawyer before and during the trial.
5. He must be tried in open court where he confronts his judge face to face. The evidence against him must be sworn to by witnesses in the court and there must be full opportunity for cross-examination.
6. He cannot be compelled to give evidence that incriminates him. It is his own choice whether he goes into witness box at all or not.

20. *Eshugbayi Eleko v. Officer Administering Government of Nigeria*, (1931) A.C. 662.

21. See 'Constitutional Law of England' by Shahani, p. 260.

7. Any reasonable doubt that is unresolved at the conclusion of the case must tell in favour of the accused.

8. He can appeal against a conviction but the State cannot appeal against an acquittal.

India.

HISTORICAL BACKGROUND OF PREVENTIVE DETENTION LAW

The law of preventive detention has been now codified in a way in Art. 22 of the Constitution. We can trace the history of the Law of Preventive Detention in India to as early a date as 1793. The East India Company Act, 1793, provided that "it shall and may be lawful for the Governor of Fort William aforesaid for the time being to issue his warrant under his hand and seal, directed to such peace officers and other persons as he shall think fit for securing and detaining in custody any person or persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of any of the British settlements or possessions in India with any of the Princes, Rajas or Zamindars or any other persons or persons having authority in India or with the commanders, Governors or Presidents of any factories established in East Indies, by an European Power or any correspondence contrary to the rules and orders of the said Company or of the Governor-General-in-Council of Fort William aforesaid".

There is, however, no record of any case in which this Act was called into force. Later on we come across the Bengal State Prisoners' Regulation of 1818 (Regulation III of 1818) whose preamble postulated that in the interests of public tranquillity and security of the state it may be necessary to place "under personal restraints individuals against whom there may not be sufficient ground to institute any judicial proceeding or that cause may not be advisable but in such cases of detained persons the grounds of such detention should from time to time come under revision and the affected persons have the right to bring to the notice of the Governor-General-in-Council all matters connected with the supposed grounds or with the manner of execution of the restraint order; that during detention the detenu will be confined according to his status with proper allowances for his wants and those of his family; that his properties shall during detention be attached and kept under the management of the Revenue authorities, etc."

This Regulation applied to Bengal which included then Bihar and Orissa, the U.P. and the Punjab except a few Scheduled Districts. Madras and Bombay had similar regulations in the Madras Regulation XI of 1819 and the Bombay Regulation XXV of 1827.

The next statute was the State Prisoners Act, 1859 (Act XXXIV of 1859 for Bengal) and of 1858 (Act III of 1858 for Madras and Bombay) which merely enabled the prisoners to be lawfully confined in fortress, gaol or other places within the limits of the Supreme Courts of judicature in the respective areas.

The First World War brought out the need for a legislation such as the Defence of India (Criminal Law Amendment) Act of 1915 "to provide for special measures to secure the public safety and the defence of British India and for more speedy trial of certain offences".

It was provided in S. 2 (1) (f) of the Act authorising the Governor-General-in-Council to make rules "to empower any civil or military authority where, in the opinion of such authority, there are reasonable grounds for suspecting that any person has acted, is acting or about to act in a manner

prejudicial to the public safety, to direct that such person shall not enter, reside or remain in any area specified in writing by such authority or that such person shall reside and remain in any area so specified, or that he shall conduct himself in such manner or abstain from such acts or take such order with any property in his possession or under the control as such authority may direct."

There was another Act, "the Indian Criminal Law Amendment Act XIV of 1908, which provided for more speedy trial of certain offences and for the prohibition of associations dangerous to the public peace." The Defence of India Criminal Law Amendment Act, 1915, set out in S. 3 that "the Local Government may by order in writing direct that any person accused of anything which is an offence punishable with death, transportation or imprisonment for a term which may extend to seven years, or of criminal conspiracy to commit or of abetting or of attempting to commit or abet any such offence shall be tried by commissions appointed under the Act." Then again the Anarchical and Revolutionary Crimes Act, 1919 (Act XI of 1919) provided special law and procedure to supplement the ordinary law for dealing with subversive movements. After this came the Defence of India Act, 1939 (Act XXXV of 1939) during the Second World War to meet war emergencies to ensure Public Safety and Defence of British India and for trial of certain offences. Section 2 (1) of the Act deals with the maintenance of public safety, public order, for securing defence of British India and efficient prosecution of the war and for maintaining supplies and services essential to the life of the community. Section 2 (2), cl. (x) enacts that the rules may provide for or may empower any authority to make orders for—

"the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area and the compelling of such person to reside and remain in any area or to do or abstain from doing anything."

Rule 26 of the Defence of India Rules was duly framed for the above purpose. But it was declared *ultra vires* in *Keshav Talpade v. Emperor*,²² in so far as it went beyond rule-making power for the detention of persons reasonably suspected of certain things which was all that the Act contemplated. But the rule over-reached the Act in empowering Government to detain a person even if it was satisfied that it was necessary to do so with a view to preventing him from acting in a manner prejudicial to any of the matters specified therein. Thus while the Act imposed a condition of "reasonableness" the rule advocated mere "satisfaction" of the Government.

After the decision²² of the Federal Court, Ordinance No. XIV of 1943 was promulgated by the Governor-General to get over the decision by substituting a new clause for cl. (x) of Sec. 2 (2) and even validating all the prior orders under Rule 26. Once again the Federal Court had occasion in *Emperor v. Shibnath Banerjee*,²³ to pronounce that 'satisfaction' of the Government that detention was necessary for preventing a person from acting in a prejudicial manner did not mean that orders of detention made in pursuance of a general order that if the police recommended detention of any person under Rule 26 such person might be detained, was good at all in law. Similarly, in *Emperor v. Keshav Gokhale*,²⁴ it was held that it was a condition pre-

22. A.I.R. 1943 F.C. 1.

23. A.I.R. 1943 F.C. 75.

24. A.I.R. 1945 Bom. 212.

cedent for a detention order that the authority making the order should apply its mind to the actual need for making the order, otherwise the order of detention would be invalid for want of "reasonable and satisfactory grounds." If there was nothing to show that the authority came to decide on a quasi-judicial consideration of the pertinent facts or exercised its discretion after a full consideration of the facts, the order would be null and void.²⁵

The Defence of India Act was repealed after the war by the Repealing and Amending Act II of 1948. But the disturbed condition of the country soon after the partition of India into Pakistan and Bharat, necessitated several security measures such as: —

Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947.

The Punjab Disturbed Areas Act, 1947.

Assam Maintenance of Public Order Act, 1947.

Bihar Maintenance of Public Order Act, 1947.

Bombay Public Security Measures Act, 1947.

C. P. and Berar Public Safety Act, 1948.

Madras Suppression of Disturbances Act, 1948.

U. P. Communal Disturbances Prevention Act, 1947.

U. P. Maintenance of Public Order (Temporary) Act, 1947.

West Bengal Disturbed Areas Act, 1947.

West Bengal Security Act, 1948.

Orissa Maintenance of Public Order Act, 1948.

The above historical background is sketched to show how from time to time established authority in India felt the need for extra powers to act in emergencies. It was either an emergency due to war or emergencies as civil strife consequent to partition of India. If the ordinances continued it was because peace and tranquillity had not become the normal feature even after the first ebullitions of freedom in Independent India. The party in power had to combat rival disturbing forces and some individuals or political parties did not seem wedded to constitutional agitation to remedy a wrong. Subversive movements, abuse of personal liberty and freedom of speech appear to endanger the larger fabric of a young society, in nascent India. This was visualised in the disturbed conditions in which India was when the Constituent Assembly met to frame the Constitution. There was no doubt a lot of discussion in the Assembly and some felt that Art. 22 might be omitted. Dr. Ambedkar, Chairman of the Drafting Committee, assured the House that the substance of the American 'due process clause' was embedded in Clauses (1) and (2) of Art. 22 which directed grounds of detention to be furnished to the arrested persons and production within 24 hours before a Magistrate. A three-month period was fixed for reference to the Advisory Board specially created to test the case of each detenu according to a procedure to be prescribed by law.

Indian Law of Preventive Detention Compared to other Countries.

It must be admitted that in a chapter guaranteeing fundamental rights

25. See also *Kamala Kant Azad v. Emperor*, A.I.R. 1944 Pat. 354; *Harkrishan Das v. Emperor*, A.I.R. 1944 Lah. 33 (F.B.); *Emperor v. Iqbal Krishna*

Kapoor, A.I.R. 1942 All. 253 (2); *Emperor v. Purushotham Trikamdas*, A.I.R. 1946 Bom. 333; *Laxman Prasad Sharma v. U. P. Govt.*, A.I.R. 1946 Oudh 183.

it is rather peculiarly anomalous that there is a short code set out embodying the principles of preventive detention. There is no such law in vogue in Federal America or in democratic England particularly in times of peace. The recent Federal Security Act, 1950, in America does make some preventive provisions to control spies and saboteurs in times of war, invasions or insurrection. But there is no such provision similar to Art. 22 in the constitution of any country as such. Only in India we have this unique insertion in the Constitution obviously to be utilized in peace time, war or emergencies. Our legislature is empowered to enact laws for preventive detention as per Entry 9, List I and Entry 3 of List III. This is legislative power in times of peace in contradistinction to war emergencies for which other provisions exist for the suspension of the entire chapter on fundamental rights and prerogative writs.²⁶ The object in giving a constitutional status to preventive detention seems to be to prevent anti-social and subversive elements imperilling the welfare of this young Republic. Of course, certain safeguards against abuse of this law of preventive detention are provided under Art. 22, clauses 4 to 7. They will be discussed later. The need for preventive detention further arises in the sense that such detention of a person without trial is necessitated by the fact that the evidence in possession of the authority will not be sufficient to make a charge or to secure the conviction of a detenu by legal proof,²⁷ but it may be sufficient to justify detention for reasons specified—

(1) in Entry 9, List I: Defence, Foreign affairs or the security of India or

(2) in Entry 3 of List III: "reasons connected with the security of a state, the maintenance of public order, or the maintenance of supplies and services essential to the community. The object is not punitive but preventive."²⁸ It is meant not merely to prevent a person from acting in a particular way but also from achieving a particular object.²⁹

The law of preventive detention cannot be challenged only in the following cases:

(1) If the law comes within the legislative ambit of lists (Entry 9, List I, and Entry 3, List III); in other words if there is legislative competency.

(2) If the law satisfies the requirements of Art. 22 (4) to (7) and provides the listed safeguards as per the article.

Preventive detention can only be with reference to future acts and not to past events. Thus having been once a member of an *unlawful* association is no ground for detention in present.³⁰ If there is legislative competency and the listed safeguards are provided, courts have nothing to do with the reasonableness or unreasonableness of the legislation. There is no question of arbitrariness in such legislation.³¹ It is just possible the authority exercising the power may abuse that power but the remedy lies through an overvigilant legislature and not a court of law.³²

In England by a course of historical circumstances preventive detention has, in a way, come to stay during war emergencies only. Dicey's old concept

26. *Gopalan v. State of Madras*, (1950) S.C.J. 174 (285, Das, J.).

27. *Vide Liveridge v. Anderson*, (1942) A.C. 206 (218).

28. *State of Bombay v. Atma Ram*, (1951) S.C.J. 208 (212): 6 D.L.R. (S.C.) 216.

29. *Gapalan v. State of Madras*, (1950) S.C.J. 174 (192): 6 D.L.R. 313, (Kania, C.J.).

30. *Emperor v. Gajanan*, A.I.R. 1945 Bom. 553.

31. *Lakhi Narayan v. Province of Bihar*, (1950) S.C.J. 32: 5 D.L.R. (F.C.) 17.

32. *Sushil v. Government of Bengal*, (1949) 53 C.W.N. 543; *vide also Lakhi Narayan v. Province of Bihar*, (1950) S.C.J. 32 (43).

of personal liberty that it can be endangered only by an offence followed by a trial and punishment for the same according to the law of the land, has given ground to the principles enunciated in *R. v. Halliday*,³³ and *Liveridge v. Anderson*,³⁴ already adverted to. Parliament was thus enabled to make regulations for detention without trial in the "interests of the public safety or of the defence of the realm". But the Parliament of England never resorted to this after a war emergency was over. Even the Emergency Power Act, 1920, made no provision for preventive detention in the interests of public order, general safety or essentials of life. This is not so in our Constitution where detention could be made in times of peace, for reasons of external or internal security, public order, etc. (*vide* Entry 3 of List III and Entry 9 of List I). This is indeed a great arbitrary power constitutionally approved and it is therefore greatly incumbent on the courts in every case that comes to them to see if there is legislative competency and the procedural safeguards has been scrupulously followed. It appears to us that while there may be justification for preventive detention for reasons of defence, foreign affairs and security of India (List I, Entry 9), there appears to be no special need for the categories set out in Entry 3 of List III, maintenance of public order or maintenance of supply and services essential to the community, etc. In line with the English law we may restrict it to security of the state. The difference will be that while in England this can be resorted to only in grave war emergencies, in India we have it for peace time also. But even that does not matter taking into consideration we are yet an infant Republic and our state should get stabilised and also have good foreign relations and towards this end we may have preventive detention for 'security of the state', 'defence' and 'foreign affairs'. But to go beyond this and introduce constitutional sanction for preventive detention for purposes of maintenance of public order, maintenance of supply and services essential to the community is to that extent putting the individual liberty of persons in great jeopardy. We may call it constitutional and executive 'nervousness' which no civilized state has hitherto exhibited in the rest of the world. The ordinary laws are more than enough for the categories set out in List 3, Entry III. It is even better to leave it to the Centre to have one uniform law under List I, Entry 9 than to allow the various State legislatures to have their dig at individual liberty under the concurrent powers given in List III. Provincial and state politics generally are at a lower standard and it is dangerous to entrust such power to them. Very often this is a powerful weapon to curb political opponents of rival parties. As it is Indian political parties, at any rate at State level, have not exhibited any robust outlook and have yet to be manned by the robust and better sections of society. At the Federal level we appear to be more safe and the objectives are clearer. It is but therefore proper to develop conditions in the country to scrap the entire law of preventive detention during peace time; at any rate we can easily scrap as a first instalment the concurrent list above referred to. 'The heavens will not fall' if this is taken off and individuals and political parties will thereby be free from the 'Damocle's sword' of constitutional oppression. The freedom thus enjoyed will certainly usher in better standards of public and civic life instead of being abused. The normal Indian is always most law-abiding and loyal. The guarantee of individual freedom in Arts. 21-22 will also be then real and not get eclipsed as it is today with constitutional safeguards as preventive detention. The critic of the Indian Constitution had been vociferous that our charter of freedom is only a charter of thralldom in the sense that what is guaranteed in one clause

33. (1917) A.C. 260.

34. (1942) A.C. 206.

is taken away or fettered by the very next clause in our Constitution. This kind of criticism is no doubt absurd but there appears to be some ground even for such criticism. Why not we remove the grossly fettering law—such as the Law of Preventive Detention. As we have already stated this law may be abrogated in gradual stages in parts, first with the abolition of preventive detention under Entry 3 in List III and later under Entry 9 in List I. Let our public give the directive to the legislators on this count and may they soon utilise the legislative machinery towards this end.

Preventive Detention as per Articles 21 and 22.

We shall now see how the law of preventive detention has been in a way codified by Arts. 21 and 22. They may be catalogued thus:

1. (a) Art. 21 provides that preventive detention can only be ordered under authority of law and in conformity with procedure laid down therein.

(b) The law must be a valid law within the legislative competence of the enacting body.

2. Art. 22 postulates:

(a) The detenu should be soon informed of the grounds of arrest, he should be given the right to consult and be defended by counsel.

(b) The detenu should be produced before the nearest Magistrate within 24 hours of his arrest after which period he cannot be detained except by authority of a Magistrate.

(c) But (a) and (b) will not apply if the detenu is an enemy alien or to any detenu who is arrested and detained under any law providing for preventive detention.

(d) The law providing for preventive detention should not authorise detention for more than three months. But this may be extended on the Advisory Board's opinion and report as to the sufficiency of the cause:

(i) The advisory board shall be constituted and consist of persons of the status of a High Court Judge or qualified to be such.

(ii) The reference to this Board and report by them in the case of each detenu should be within the three months after arrest of the concerned detenu.

(iii) The maximum period of detention may be prescribed by law by Parliament in certain stated special circumstances and classes of cases where it may exceed the three-month limit for consultation with the Advisory Board. Parliament may also prescribe the maximum period for any class or classes of cases of detention under any law for preventive detention.

(e) The detenu should be given an opportunity to show cause against the order and grounds of detention. The grounds should be disclosed except such facts which the "authority making the order" considers to be against the public interest to disclose.

(f) Parliament may prescribe by law the procedure to be followed by an Advisory Board.

Any law made under Art. 21 cannot override the limitations set out in Art. 22. As decided in *A. K. Gopalan's case*³⁵ "to the extent the procedure is

35. *A. K. Gopalan v. State of Madras*, (1950) S.C.J. 174 (188-9

per Kania, C.J.): 6 D.L.R. (S.C.) 311.

prescribed by Art. 22 the same is to be observed; otherwise Art. 21 will apply. . . . If the legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of Part III of Art. 22 (4) to (7), the Preventive Detention Act must be held valid notwithstanding that the court may not fully approve of the procedure prescribed under the Act". It may be more aptly stated, "Art. 22 prescribed the minimum procedure that must be included in any law permitting preventive detention as and when such requirements are not observed, the detention, even if valid *ab initio* ceases to be in accordance with procedure established in law".³⁶ In short, Art. 22 lays down the permissible limits of legislation empowering preventive detention. "Art. 21 is applicable to preventive detention except in so far as the provisions of Art. 22 (4) to (7) either expressly or by necessary implication exclude its application with the result that a person cannot be deprived of his personal liberty even for preventive purposes 'except according to procedure established by law'. Part of such procedure is provided by the Constitution itself in clauses (5) and (6) of Art. 22. . . . If the procedure is not complied with, detention may be held to be unlawful as it would then be deprivation of personal liberty which is not in accordance with procedure established by law".

We may restate that Arts. 21 and 22 are independent of the provision in Article 19. In *Ram Singh v. State of Delhi*,³⁷ it was posited that "even though a restriction upon the freedom of expression may be invalid owing to the fact that it is not covered by Art. 19 (2) the same ground may justify preventive detention, for Art. 22 is not limited by any such consideration." But after the inclusion of the words 'public order' in Art. 19 (2) by the Constitution Amendment Act, 1951, the field for difference appears to have been narrowed altogether.

The detention to which the clauses of Art. 22 apply is made otherwise than by an order of a court. Article 22 has, therefore, no application to an order made under Sections 110, 118 and 123, Criminal Procedure Code and the said sections have not been rendered void by Art.^{37a}

The word "arrest" in Art. 22 has a much restricted meaning and does not include the removal of a minor girl from a brothel or from premises used as a brothel, say under Sec. 13 of the Bengal Suppression of Immoral Traffic Act, 1933.^{37b}

The sufficiency of the particulars conveyed to a detenu in accordance with the provision embodied in Art. 22 (5) is a justiciable issue, the test being whether these are sufficient to enable the detenu to make an effective representation.^{37c}

It may be noted that Sec. 61, Cr.P.C., provides for arrests without warrant by a police officer and insists on production of the arrested person before a magistrate within twenty-four hours. Article 22 (2) of the Constitution in effect not only gives constitutional protection to this provision but further

36. *State of Bombay v. Atma Ram*, (1951) S.C.J. 208 (211), Sastri, J.: 6 D.L.R. (S.C.) 216.

37. (1951) S.C.J. 374 (376), Sastri, J.: 6 D.L.R. 245.

37a. *Jet Bahdur Singh v. The State*, A.I.R. 1953 All. 753.

37b. *Raj Bahdur v. Leg. Remembrance, Government of West Bengal*, A.I.R. 1953 Cal. 522.

37c. *Shibban Lal Saksena v. State of Uttar Pradesh*, A.I.R. 1954 S.C. 179.

liberalizes it by making the provision applicable in those cases also where the arrest is made in pursuance of a warrant.^{37d}

In another Allahabad case,^{37e} it was held that a person detained in the custody of Superintendent of a Jail under the order of the Governor under S. 3 (1) (a) (ii) of the Preventive Detention Act, 1950, was not a prisoner within the meaning of S. 52 of the Prisons Act and therefore was not liable to be punished under the provision.

Safeguards in Art. 22.

Art. 22 contains two parts: (a) The first part is contained in Clauses (1) and (2) which lay the limitations upon the Union and State Legislatures in enacting any procedural law for deprivation of personal liberty (*vide* Entry 2 of List III read with Art. 21). Thus the ordinary law to which the limitations fixed are: (i) that the arrested person must be informed of the grounds of his arrest as soon as may be, (ii) production of the arrested person within 24 hours of his arrest to the nearest magistrate, (iii) the arrested person should be given the opportunity to consult a legal practitioner and to defend himself. It may be noted production within 24 hours before the magistrate is not available in case of a detenu arising under clauses (4) to (6) of Art. 22.

(b) The second part is contained in clauses (4) to (6) of Art. 22 and covers the special law of preventive detention as such in contradistinction to 'the ordinary law' set out above. These cover the limitations on the Union and State Legislatures to make any law of preventive detention without trial (*vide* Entry 9 of List I and Entry 3 of List III, Sch. VII). The limitation to prevent "arbitrary arrests" by the executive under cover of such "preventive laws" are set forth hereunder:

(i) The ordinary period of detention without trial cannot exceed three months. But Parliament may enact a law laying down in what cases the three-month limit may be exceeded [Art. 22 (7) a].

(ii) Also the three-month limit may be exceeded in the report of the Advisory Board duly constituted in this behalf [Art. 22 (4) a].

(iii) The detenu must be furnished as soon as may be the grounds of detention to enable him to make a representation against such order of detention [Art 22 Cl. (5)].

(iv) But the authority need not disclose facts which will be against public interest to disclose [Art. 22, cl. 6].

(v) The protection of Art. 22 clauses (1) and (2) is not available to an enemy alien or any person detained under any law of preventive detention.

Salient Points from Leading Cases under Art. 22.

I. *A. K. Gopalan's case*.³⁸ In this case the following points were stressed:

(i) Art. 22 does not form a complete code of constitutional safeguards relating to preventive detention. To the extent that provision is made in Art.

37d. *Swami Hariharan and Saraswathy v. Jailor, Dist. Jail, Banaras*, A.I.R. 1954 All. 601.

37e. *Bijai Bahadur v. State*, A.I.R.

1954 All. 627.

38. *A. K. Gopalan v. State of Madras*, 6 D.L.R. (S.C.) 313: A.I.R. 1950 S.C. 27. 1950 S. C J. 174.

22 it cannot be controlled by Art. 21; but on points of procedure which expressly or by necessary implication are not dealt with by Art. 22, Art. 21 will apply. (*Per Kania, C.J., Sastri and Das, JJ.*).

(ii) Therefore in a case of preventive detention, the procedure prescribed by the law under which detention is made must be strictly followed and if this is not done the person detained is entitled to be released by the court. For illustration of this see *Makhan Singh v. State of Punjab*.³⁹

(iii) Art. 22 (5) affords to the detenu the right to make a representation (by full court) but this does not confer any right to be heard by an independent tribunal. (*Per Kania, Sastri and Mukherjea, JJ.*).

(iv) The detaining authority must communicate to the detenu the grounds on which the order is based. Lack of this will invalidate an order of detention. This will be so also when the grounds on which the order has been made have absolutely no connection with the order or have no connection with the circumstances or classes of cases under which preventive detention could be supported (*Per Sastri, J.*) or the grounds are too vague to enable him to make the representation (*Per Kania, C.J., and Sastri, Mukherjea and Das, JJ.*).

(v) Clause (7) of Art. 22 means that Parliament may prescribe either the circumstances under which or the class or classes in which a person may be detained for a period longer than three months without reference to an Advisory Board. It is not necessary that Parliament should prescribe both. In other words the conjunction 'and' in Art. 22 (7) is to be construed as 'disjunctive'.

The other points that emerge from *A. K. Gopalan's* case in relation to the impugned Act, the Preventive Detention Act IV of 1950, are:

(1) Sec. 3 is not *ultra vires* as there is thereby no delegation of legislative power. What is conferred is discretionary exercise of power to enforce the law on an executive officer. By its very nature the making of an order of preventive detention must rest on the subjective satisfaction of the executive authority making the order.⁴⁰

(2) Sec. 7 is *intra vires* since Art. 22 (5) does not afford a fundamental right to be heard by an independent tribunal. Art. 22 only contemplates a special procedure being prescribed for preventive detention. So if Sec. 7 affords that special procedure, it cannot be challenged as contravening Art. 22 merely on the ground that it is not the normal procedure in vogue.

(3) As Art. 22 (7) (c) confers full power upon Parliament to lay down the procedure to be followed by the Advisory Board Sec. 10 (3) of the impugned act cannot be *ultra vires* merely on the ground it excludes the right to appear before the Advisory Board in person or by counsel or that it prevents disclosure of the report of the Board.

(4) Under Art. 22 (7) (b) Parliament is not bound to fix the maximum period of detention. So Sec. 11 cannot be invalidated on that ground. Further the life of the impugned Act itself is only one year.

39. (1951) S.C.J. 835; (1952) 7 D.L.R. 76 (S.C.).

1950 S.C. 211; (1950) S.C.J. 328; 5 D.L.R. 36 (S.C.).

40. *Vide* Dr. Khare's case, A.I.R.

(5) Art. 21 or 22 does not invalidate Art. 13 (2). So a detention order if revoked against a person, a fresh detention order might be made against the same person and on the same grounds.

(6) Sec. 14 is *ultra vires* since (1) it prohibits the disclosure of the grounds furnished to the detenu, since without this there can be no effective making of a representation per Art. 22 (5); (2) it also offends Art. 32 which guarantees the right to move the Supreme Court for assertion of rights guaranteed by Art. 22 (5). The non-furnishing of grounds leads to inability to move the Supreme Court.

It may be added that the impugned Sec. 14 prohibited any statement to be made or any evidence to be given before it of the substance of any such communication made under Sec. 7 of the grounds on which the detention order has been made against any person or any representation made by him against such order. It also prohibited any officer to produce before it or to disclose the substance of any such communication or representation made or the proceedings of an Advisory Board which is confidential. Their Lordships held that Sec. 14 was *ultra vires* of Art. 22 (5) since it debarred all materials to be placed before the court to determine if the order of detention was proper or not. Non-disclosure of certain facts is curtailed by the safeguard in Art. 22 (6), but there can be no withholding of the grounds at all nor the other facts required under Art. 22 (5).

II. *State of Bombay v. Atma Ram Shridhar Vaidya*.⁴¹

The following can be listed as points decided in this case:

1. Though it was not obligatory upon the authority to disclose all facts other than those which it had the privilege to withhold under Art. 22 (6) the authority must nevertheless furnish information sufficient to enable the detenu to make representation. If the particulars were not sufficient for the purpose, it offended Art. 22 (5) and hence the detenu was entitled to be released. But once the grounds are communicated no new or additional grounds may be furnished, (*per Kania, C.J.*). In other words:⁴²

(1) If the representation has to be intelligible to meet the charges contained in the grounds the information conveyed to the detained person must be sufficient to attain the object.

(2) While there is a connection between the obligation on the part of the detaining authority to furnish grounds and right to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. For the first, the test is whether it is sufficient to satisfy the authority; for the second, the test is whether it is sufficient to enable the detained person to make the representations at the earliest opportunity.

Sastri, J., summarised *Atma Ram's case* in a later case⁴³ thus:

1. That mere vagueness of grounds standing by itself and without leading to an inference of *mala fides* or lack of good faith is not a justiciable

41. (1951) S.C.R. 167; (1951) S.C.J. 208; A.I.R. 1951 S.C. 157; 53 B.L.R. 457; 6 D.L.R. 216 (S.C.).

42. As summarised by Mahajan, J., in *Ramsing's case*, (1951) 6

D.L.R. 245; 1951 S.C.J. 374.

43. *Ujjer Singh v. State of Punjab*, S.C. Petitions 149167 of 1950, A.I.R. 1952 S.C. 383; (1952) 7 D.L.R. 416.

issue in a court of law for the necessity of making the order, inasmuch as the ground or grounds on which the order of detention was made is a matter for the subjective satisfaction of the detaining authority.

2. That there is nothing to prevent particulars of grounds being furnished to the detenu within a reasonable time so that he may have the earliest opportunity of making a representation against the detention order—what is reasonable being dependent on the facts of each case.

3. That failure to furnish grounds with the speedy addition of such particulars as would enable the detenu to make a representation at the earliest opportunity against the detention order can be considered by a court of law as an invasion of a fundamental right or safeguard guaranteed by the Constitution, *viz.*, being given the earliest opportunity to make a representation.

4. That no new grounds could be supplied to strengthen or justify the original order of detention.

Where particulars are necessary in order to make the grounds intelligible, the particulars also must be furnished "as soon as may be."⁴⁴

III. *Tarapada v. State of West Bengal.*⁴⁵

In this case the following were postulated:

1. "As soon as may be" means as early as is reasonable in the circumstances of the particular case. No definite time can be laid down as reasonable in all cases.

2. Whether a subsequent communication constitutes "new or additional" ground within the meaning of *Atma Ram's case* is to be determined with reference to the contents of the communications read as a whole and considering their true effect; mere description of the second communication by the authority as "supplementary" was not conclusive on the point. When further materials, not being additional grounds, are being communicated to the detenu it does not follow that further materials were not within the knowledge of the authority at the time of the order or at the time when the first communication was made.

3. An "irrelevant" ground is a ground which has no connection at all with the satisfaction of the authority, while a "vague ground" is one which is not sufficient to enable the detenu to make an effective representation.

4. The sufficiency of the grounds which gives rise to the satisfaction of the authority is not a matter for examination by the court. The court can interfere only if it is irrelevant. But sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the court—but only from that point of view. It does not follow that if the grounds are not sufficient for making representation they are

44. See footnote 43.

45. (1951) 6 D.L.R. 235 (S.C.);
A.I.R. 1951 S.C. 174: (1951)

S.C.J. 233: (1951) 1 M.L.J. 431;
1951 S.C.R. 212.

necessarily insufficient, also for the subjective satisfaction of the Court. The sufficiency in the one case is objective while in the other it is subjective.

IV. *Bhimsen v. The State of Punjab*.⁴⁶

The points to be noted from this case are:

1. The legislature has made only the subjective satisfaction of the authority making the order essential for making an order of detention under S. 3 of the Preventive Detention Act, 1951, and that the discretion of the detaining authority in respect of the initial order is not taken away because of the Amending Act of 1951. Act IV of 1951 establishes a supervisory authority, i.e. Advisory Board.

2. Instances of past activities are relevant to be considered in giving rise to the subjective mental conviction of the detaining authority that the persons to be detained are likely to indulge in objectionable activities. Though the object of preventive detention is to prevent a person from acting in future in an objectionable way, the court cannot hold that the order detaining him is *mala fide* because it refers to past activities, for the satisfaction of the detaining authority is subjective.

3. It is not for the court to question if the grounds given in the order of detention are sufficient or not for the subjective satisfaction of the detaining authority under S. 3. For the same reasons, the question of the truth of the statements is equally beyond the jurisdiction of the court to decide. Where a statement of fact contained in the affidavit filed in court by the detaining authority is disputed, it is for the Advisory Board to consider the matter.

'Mala fides'.

On the question of *mala fides* it is apposite to note that in *A. K. Gopalan's case* it was decided that it was open to the court to examine if the order of detention was *mala fide*. In the instant case⁴⁶ it is further emphasised that the court cannot pronounce the order to be *mala fide* merely because the order refers to the past activities as the ground of the matter. It is not a question of reviewing the past activities so as to find if the person will act similarly in the future. It is also not necessary for the court to see if the facts of the prior acts are true. For the whole matter of sufficiency of the grounds is left to the subjective satisfaction of the authority which detains and the ambit of court's power is restricted to (1) if the ground stated is relevant, (2) if particulars of grounds have been furnished early (3) and if the detenu has been denied the procedure and safeguards outlined in Art. 22.

In *Ashutosh Lahiri v. State of Delhi*,⁴⁷ the question of *mala fides* arose pointedly since the question was whether the use of the power of preventive detention to secure the purposes of S. 144, Criminal Procedure Code, was *per se mala fide* use of that power. Mukherjea, J., held with the majority in that case and stated: "There could be no better proof of *mala fides* on the part of the executive authorities than a use of the extraordinary provisions contained in the Preventive Detention Act for purposes for which the ordinary law is sufficient." The question as to how the detenu is to establish the charge of *mala fides* has not been clearly set out. Suspicion was not proof

46. (1952) S.C.R. 18: A.I.R. 1951 S.C. 481: (1952) 7 D.L.R. 78 (S.C.): (1951) S.C.J. 481: (1951) 2 M.L.J. 641.

47. (1950) S.C.J. 433: (1950) D.L.R. (S.C.) 94; (1950) 2 M.L.J. 555.

of *mala fides*. The Court is not entitled to release the person on proof of *mala fides* but not indicating which is valid and on what way he should substantiate *mala fides* is rather a hard position indeed. But this appears certain, if the purpose for which the detention order is served is as well as achieved by resort to the ordinary law then the charge of *mala fides* may be taken as apparent. The opinion of certain High Courts that it must be left to the subjective determination of the executive to decide whether the ordinary law or law of preventive detention should be applied in a particular case does not seem to be convincing in view of the opinion of the Supreme Court in the instant case.⁴⁶

This view of the matter practically reduces the ambit of applicability of one of mere competence of the legislature. Prof. Bernard Schwartz of comparative law of the Gopalan's case⁴⁷ felt that the legislative competence of the Indian law but the British concept of 'natural justice' and its procedural equivalent, the procedural due process. Though the view in Gopalan's case has been reiterated in subsequent cases,⁴⁸ it may be usefully stated that the extent might be ascribed at least a minimum guarantee against legislative encroachment upon individual liberty. But this could have been possible in the Indian law if it had accepted Sastri, J.'s view to the effect that the law of preventive detention, i.e. prevention of acts prejudicial to the security of the state, maintenance of public order, etc. There is a *mala fide* exercise of the power if the grounds upon which the order is based are not proper or relevant grounds which would justify detention under the provisions of the law itself. The onus definitely is on the accused to prove *mala fide*, though invariably he cannot easily succeed on this score, unless he resorts to substantiating the same on the lines indicated in Ashutosh's case.⁴⁷ The order of detention was held to be not *mala fide* in the following circumstances:—

(3) The object of Art. 21 is to prevent encroachment upon personal liberty. Where the order of detention refers to past activities of the detenu as giving rise to the satisfaction of the detaining authority.⁴⁹ (C.J. Sastri and Mukherjee JJ.).

2. Merely because wrong facts were placed before the authority which passed the order.⁵⁰

3. Merely because on the expiry of his detention under a temporary law of preventive detention a person is detained on the self-same grounds under another Act.⁵¹

4. Where the order of detention is made after failure to secure a conviction under the ordinary criminal law. So also if there is a pending criminal case against a person, if that case is withdrawn, and an order of detention is made against him the order cannot be necessarily called *mala fide*.⁵² The facts of each case must lead to a determination as to *mala fides*.⁵³ As to whether a person is to be proceeded against under the ordinary law or the preventive laws, is altogether left to the subjective satisfaction of the authorities.⁵⁴

(4) The object of Art. 21 is to prevent encroachment upon personal liberty. Where the order of detention refers to past activities of the detenu as giving rise to the satisfaction of the detaining authority.⁴⁹ (C.J. Sastri and Mukherjee JJ.).

2. Merely because wrong facts were placed before the authority which passed the order.⁵⁰

3. Merely because on the expiry of his detention under a temporary law of preventive detention a person is detained on the self-same grounds under another Act.⁵¹

4. Where the order of detention is made after failure to secure a conviction under the ordinary criminal law. So also if there is a pending criminal case against a person, if that case is withdrawn, and an order of detention is made against him the order cannot be necessarily called *mala fide*.⁵² The facts of each case must lead to a determination as to *mala fides*.⁵³ As to whether a person is to be proceeded against under the ordinary law or the preventive laws, is altogether left to the subjective satisfaction of the authorities.⁵⁴

48. *Jhalajorubha v. State*, A.I.R. Supreme Court, *Continuation of Police* 1950, Bom. to p. 1952; *Sau. 12*; *Subodh v. The* 22 was 202, 5 D.L.R. 110 (B); *Bapoo v. State*, A.I.R. 1951 Pat. 68, 6; *Ram v. State*, A.I.R. 1951 All. D.L.R. 313 (P). 338 (342).
49. *Bhimsen v. State of Punjab*, (1952) 7 D.L.R. 78 (S.C.); A.I.R. 1951 S.C. 481; (1951), S.C.J. 747.
50. *Pyarelal v. State*, A.I.R. 1952 All. 180; *State v. Pyarelal*, S.C.J. 747.
51. *Annata v. State*, A.I.R. 1951 Orissa 27; *Ram Adar v. State*, A.I.R. 1951 All. 18.
52. *Ram v. State of Police*, A.I.R. 1952 Cal. 202; *Maledath* 48. *Jhalajorubha v. State*, A.I.R. Supreme Court, *Continuation of Police* 1950, Bom. to p. 1952; *Sau. 12*; *Subodh v. The* 22 was 202, 5 D.L.R. 110 (B); *Bapoo v. State*, A.I.R. 1951 Pat. 68, 6; *Ram v. State*, A.I.R. 1951 All. D.L.R. 313 (P). 338 (342).
53. *Subodh v. State*, A.I.R. 1951 Pat. 68; 6 D.L.R. 313 (P); *Jagannath v. State of Bihar*, A.I.R. 1952 Pat. 185 (B); 6 D.L.R. 235 (P); *Batalvi v. D.M. Ganjam*, A.I.R. 1952 Orissa 52.
54. *Jhalajorubha v. State*, A.I.R. 1952; *Sau. 12*. But see *Ashutosh's case*, (1950), S.C.J. 433 (1950) D.L.R. 313 (P); 338 (342) 2 M.L.J. 555.

[illegible]

We shall now consider serially the various clauses examined by a tribunal consisting of a Superintendent of Police from India and a Superintendent of **'Bona fides'** Pakistan who may be expected to deal with the question of the abducted persons' status in highly and impartially. Tainted neither by the ordinary wrongs of improving or maintaining the sanctity of the illegal or to have a *fide* criminal law, a definition containing the prohibition in regard to interference of deposed and where it is impossible to secure principles of justice for propriety under conflict with Art. 22 there is nothing unreasonable detention are quite within the Act alone would restore and restoration of spheres abductees which the ordinary process of Khosla, I was exercised by the Supreme Court in appeal.⁷¹

In *Ansumali v. State of West Bengal*,¹ the Supreme Court held that under the existing law, persons returned as members of the State Legislative Assembly or Council of the State could not be kept in preventive detention for a period exceeding three months. The latter was not required to furnish the period of detention which is specified in Articles 21 and 22 of the Executive Order. The Bench also confirmed the order of detention, as it is the Government which fixes the period which shall not exceed one year.

56.	In <i>Burma v. State⁷³</i> it was held that the extradition treaty between the 56. <i>Norwegian v. State of Punjab</i> A.I.R. 1952 S.C. 106. A.I.R. 1952 S.C. 106.	57b.	<i>State of Punjab v. State of Punjab</i> A.I.R. 1953 S.C. 451. A.I.R. 1950 S.C. 438, (1950) 2 P.W.D. 555.
56.	<i>Gour Gopal v. Chief Secretary</i> , 67. (1955) 58 CWN 3127.	57b.	<i>State of Punjab v. State of Punjab</i> A.I.R. 1953 S.C. 451. A.I.R. 1950 S.C. 438, (1950) 2 P.W.D. 555.
58.	(1955) 58 CWN 3127.	57b.	<i>State of Punjab v. State of Punjab</i> A.I.R. 1953 S.C. 451. A.I.R. 1950 S.C. 438, (1950) 2 P.W.D. 555.
59.	<i>State of Punjab v. State of Punjab</i> A.I.R. 1953 S.C. 451. A.I.R. 1950 S.C. 438, (1950) 2 P.W.D. 555.	57b.	<i>State of Punjab v. State of Punjab</i> A.I.R. 1953 S.C. 451. A.I.R. 1950 S.C. 438, (1950) 2 P.W.D. 555.
70.	A.I.R. 1952 P.W.D. 555. Disting.	72.	1950 P.W.D. 555. Disting.
		73.	A.I.R. 1951 Raj. 127.

Art. 22 (1) applies only if a person is arrested and detained. It does not apply to civil proceedings and arrests thereunder.^{57c}

Where in a summary trial under the Cr.P. Code the accused were not intimated about the date of the trial nor were they told that under Art. 22 and Sec. 340 of Cr.P. Code they had a right to consult a legal practitioner and be defended by him nor were they warned against making incriminating statements, the said rights having been denied the trial is vitiated.^{57d}

Article 22, Clause (1).

Right to be informed of Grounds.

While the arrested person is entitled to be furnished with grounds, he cannot expect a minimum time-limit guaranteed to him for the same. The words used in Cl. (1) of Art. 22 are "as soon as may be" which in effect means "as nearly as is reasonable in the circumstances of a particular case."⁵⁸ The same words occur in Cl. (5) also. If the Government had to deal with a number of emergent cases a delay of 18⁵⁸ or 22 days⁵⁹ in supplying "grounds" should be treated in the circumstances of a particular case as within the category of "as nearly as may be." But a delay of two months even after service of notice on the authority of an *habeas corpus* petition was considered as not complying with the "as soon as may be" clause.⁶⁰ If the reasonable time for furnishing of grounds has been exceeded in the opinion of a court, the latter could release the detenu.⁶¹ The right to be informed of the grounds and the right to consult or to be defended by a legal practitioner of his choice are the two fundamental rights extended under this clause. They are the two mandatory privileges available to the arrested persons and operate as constitutional conditions subsequent to arrest.⁶² Hence even though there is an initially valid arrest made, the detenu has to be released if the above two subsequent conditions are not fulfilled.⁶³

The language of Art. 22 clauses (1) and (2) clearly excludes from its operation warrants of arrest issued by a court on a criminal or quasi-criminal complaint or under security proceedings. It is obvious that the Article is designed to give protection against the act of the executive or other non-judicial authority.⁶⁴ But the physical restraint put upon an abducted person in the process and taking that person into custody and put in charge of the nearest camp under S. 4 of the Abducted Persons (Recovery and Restoration) Act, 1949, cannot be regarded as "arrest and detention" within the meaning of Art. 22 (1) and (2) and *a fortiori* the Act can be deemed as *ultra vires* of Art. 22.⁶⁴

The limiting conditions after arrest in Cl. (1) follow the salient principles of English law. "It is a general rule, which has always been acted by the

57c. *Dharam Chand v. Ladu Ram*, A.I.R. 1956 Aj. 63; C.L.R. 1956 Aj. 23.

57d. *Hansraj v. State*, C.L.R. 1956 All. 433; A.I.R. 1956 All. 641.

58. *Tarapada v. State of West Bengal*, (1951) S.C.J. 233 (18 days) (215).

59. *Motilal v. State*, (1951) 6 D.L.R. 23 Pat. (22 days); See also *State of Bombay v. Atma Ram*, (1951) S.C.J. 208 (215).

60. *Sarvadevabhata v. State*, A.I.R. 1951 Hyd. 43.

61. *State of Bombay v. Atma Ram*, (1951) S.C.J. 208; 6 D.L.R. 216 (S.C.).

62. *Durgadas v. Rex*, A.I.R. 1949 All. 148 (F.B.).

63. *Murat v. Province of Bihar*, A.I.R. 1949 Pat. 135; *Mani v. Dt. Magistrate*, A.I.R. 1950 Mad. 162.

64. *State of Punjab v. Ajaib Singh*, (1952) S.C.J. 791; (1952) & D.L.R. 33 (S.C.); A.I.R. 1953 S.C. 10.

courts of England that if any person procures the imprisonment of another, he must take care to do so by steps all of which are regular and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."⁶⁵

Right to consult and be defended by a lawyer of his choice.

We have seen how availability of "legal aid" is a necessary guarantee and adjunct of individual liberty in America and England. In America in all capital cases, a poor accused is of right entitled to free legal defence. In England the Poor Prisoners' Defence Act, 1930 and Legal Aid and Advice Act, 1949, afford the relief in a measure to any person having an income of less than £420 per annum.

Points from American and English Legal Aid Systems.⁶⁶

"In America to make legal aid a community matter other influential interests than lawyers such as chambers of commerce, social service, organizations, etc., join in the management of Legal Aid societies, in laying down policies, getting funds, etc. A committee of the Bar, however, is left in control of the actual aid. In England it is the Bar through the Law Society of England under the direction of the Lord Chancellor that operates the scheme envisaged in the Legal Aid and Advice Act of 1949. Governmental control is absent in America. . . . In America finances for legal aid come 60 per cent. from community chests organized by the public, 6 per cent. from the clients, 8 per cent. from Bar Associations and lawyers, 9 per cent. from tax funds while other sources as income from capital funds, contributions from the general public and foundation grants come to 17 per cent. In respect of aid for original cases, a fourth of the fund for financing the defender was from private contributions. The rest 75 per cent. came from public funds of which 60 per cent. was from city and County Governments and only about 9 per cent. from Tax Funds."⁶⁶

"The standards set up by the National Legal Aid Society of America in 1949 can be listed thus:—

1. An informed and responsible governing body, preferably a Board of Directors which shall fully represent the legal, social and civic interests of the community. This body shall meet at least quarterly.
2. A staff of at least one or more full time attorneys shall be engaged.
3. An office for privacy of interview between attorney and client.
4. Maintain active and friendly relations with other social agencies and with organized Bar.
5. Maintain qualified staff personnel, make use of social service exchange, give consultations and help on the preventive side also.
6. Keep complete record of the activity and maintain reference list of counsel willing to render aid.

The distinguished American pioneer in Free Legal Aid, Mr. Reginald Smith, in his celebrated book *Justice and the Poor* said, "Legal aid offices and

65. *Enraght's case*, (1881) 6 Q.B.D. 876.

66. *Vide* Author's article on "Legal Aid, a Constitutional Service"

in (1953) 8 D.L.R. (Journal) pages 18-21 and also in 1954 S.C.J. (Journal) 104 under caption "Legal Aid in India."

which would include traffic in women and children for immoral or other legal service offices are much better when entrusted to Bar Associations than to Government Bureaus. But legal aid offices and legal service offices conducted by the Government are much better than nothing. Hyderabad Special Tribunals Regulation (5 of 1308 Fasli) was upheld as *intra vires* of Arts. 14, 21 and 25 and the legal aid fund consists of special donations from (1) the Regulation (nearly 15%); (2) contributions and fees from assisted persons (nearly 60%); (3) realizations of court costs awarded. In criminal cases (nearly 60%) comes from county funds. The basic principles of detention legal aid than three months was a violation of Art. 22 (4) and a report of procedure established by law under Art. 21.

In *No person ought to be deprived of legal advice or of legal representation* before any court which provides for compulsory residence in the lines unless specially exempted and presence in the lines should receive the legal aid attendance at all parades and roll calls during 24 hours towards his or her cost but those who can afford to contribute something towards his or her cost should contribute what they can. *Ramkrishna v. King Emperor*⁸⁰ was distinguished in that the confinement directed in that case was for an unlimited period and as such the legal service should be provided by the legal profession who should receive fair and reasonable remuneration for their service.

In *Maheshwari Devi Jute Mills Ltd. Kanpur v. Labour Appellate Tribunal*⁸¹ it was held that the aid should not be a departmental or state or local authority but should be by the profession itself. This is done by the Law Society acting under the supervision of the Lord Chancellor, dividing England and Wales into 12 areas with an area committee in each to determine the nature of the aid, fix the area panel of aid lawyers, assign them, collect and administer funds for that purpose.

In *Sec. 7 of Influx from Pakistan (Control) Act, 1949* was held *intra vires* of Art. 22. Where a person is arrested in enforcement of the direction in an order under Sec. 7 of the Act, 23 of 1949 for the purpose of removal from India and he is informed of the order of the Government, the time of his arrest it was pointed out in the instant case that the States or State Bar Associations in the field of legal aid in criminal cases, legal aid is restricted to High Courts. But county and other courts are left but where there are lots of opportunities for aid in workman's compensation cases, rent restriction cases, etc.

There is no national organization as the Law Society of England in America which is rather too large a country for developing such a unitary and central authority. India being a federal country with no pre-determined pattern of legal aid such as the Society type and "Bar Association type" in the civil side and the "defender type" on the criminal side. The society type is an independent entity generally as a charitable corporation was not sometimes as an incorporated voluntary association. It has a governing board with a managing attorney. It moves in close co-operation with the Bar which formulates policies and compensation problems of 1949 and public relations. It has besides effective ties with the social welfare field where it operates. The "defender type" when it is of the public defender variety is tax supported while the "voluntary defender" is private aided. There is an office with a paid defender, a number of deputy defenders, paid investigators and a clerical staff. A Board of Directors lay down the policy. The defenders take up all defences sent to them just as the prosecutors take up prosecutions. The defender type for legal aid on the criminal side requires funds. The assigned counsel system is the alternative for individual cases from a chosen panel. The aid may be partly paid or quite free.

The *Abducted Persons (Recovery and Restoration) Act, 1949* and *Public Relations Act, 1949* (1) has besides effective ties with the social welfare field where it operates. The "defender type" when it is of the public defender variety is tax supported while the "voluntary defender" is private aided. There is an office with a paid defender, a number of deputy defenders, paid investigators and a clerical staff. A Board of Directors lay down the policy. The defenders take up all defences sent to them just as the prosecutors take up prosecutions. The defender type for legal aid on the criminal side requires funds. The assigned counsel system is the alternative for individual cases from a chosen panel. The aid may be partly paid or quite free.

88. A.I.R. 1953 Sau. 51. 89. A.P.E. 1954 Cal. 60. 90. A.P.E. 1954 Cal. 60. 91. S.G. 318 following the society type is the most popular numbering 37, the Bar Association offices, come next (20) A.P.E. department of social agencies following 345, while public bureaux number 11 and law school clinics figure 95. A.I.R. 1954 Mad. 993.

Application of Legal Aid Systems in India.⁶⁷

(1) The Code exempts special procedures in special laws. It was therefore we have digressed a little in giving so much detail of the American and English legal aid systems for very good reasons. India is now a new Republic and democracy barely one year old. Its Constitution intends to be personable to the citizen and therefore offers a special guarantee of equality before law and equal protection in law per Art. 14. Article 22 declares that all persons will be given the right to consult and be defended by a legal practitioner of his choice. This is the only one that in a democratic India the law in its application as well as the availability of legal remedies is the same for the rich and the poor. It is possible to recall the words of Mr. J. B. P. from his book *Legal Aid in India* described "The forces of totalitarianism are again on the march subjugating more millions of people to the tyranny of stateism." The providing of adequate legal aid service is not a matter of small consequence but in the face of so ominous a threat. Layman Abbot feared that the alternative to denial of legal aid was that "the fire brand of revolution with a lighted and put into the hands of men who will almost be justified in their revolutionary tactics." If this is the position of America where legal aid schemes have advanced a lot, what will be the fate of democracy in India if legal aid is not well organized? Mr. B. G. Kher, former Chief Minister of Bombay, echoed a similar warning at the first Bombay Provincial Legal Aid Conference in 1949 where he stated "Nothing rankles in human heart more than the feeling of injustice. It produces a sense of helplessness and then bitterness. It is brooded over. It then leads to direct contempt for law, disloyalty to Government and plants the seed of anarchy. Legal aid is not a charity but a duty in a democratic state, nay it is a necessity of a very compelling nature if you want to sustain our federal democracy and not to allow it to go to pieces by forces of disorder." These words are most apposite and in this work on constitutional law it is almost our sacred duty to focus public opinion, and draw the fullest co-operation of the Bench, the Bar and the public on this statutory as well as moral obligation of ours to afford legal aid to all poor litigants in the assertion of their rights.

What we may recall the words of the American Judge W. B. Rutledge: "Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favour, or grace or of discretion." We wish to stress here that it is imperative that attention is also focussed on the need for giving proper legal aid to detenus. If that is denied the erstwhile detenu is likely to become tomorrow's anarchist and saboteur. On the other hand, if the detenu is assured good legal aid there is a chance of weaning him round as the respecter of our laws and organized society. It is suggested that since Art. 22 (1) merely gives an opportunity to secure legal aid and Art. 22 (5) extends merely a right to make representation, the law must be amended that the state do afford paid counsel to help a detenu or an arrested person both under Art. 22 (1) and (5) whenever the person cannot afford to engage counsel.

Slow Progress in India in the Field of Legal Aid.⁶⁸

Prior to the advent of the new Republic in the era of British occupation we thought very little of this principle of Free Legal Aid in India. In the statute law only in capital offences was counsel allotted by the State at its expense to a poor accused. The provision in the Civil Procedure Code

⁶⁷ *Vide* (1953) 2 D.L.R. (Journal), pp. 18-21.

⁶⁸ *Vide* footnote 67 55: I.L.R. (1957) Ker. 873.
1. A.I.R. 1957 Pat. 639.

regarding pauper suits are inadequate as apart from court-fee the litigant was never spared other items of expenditure. There is no provision for defendant paupers at the trial stage or for respondents in civil appeals. There is no analogous statute in India as the English Poor Prisoner's Defence Act of 1930 whereby the judge of a court of criminal jurisdiction can grant a certificate in any criminal case to enable the accused being defended by a counsel of the legal aid panel of that court. The fee of counsel was there met from county or local funds.

In India legal aid is imminently necessary in a variety of fields, criminal cases of capital and other offences, workman's compensation cases, guardianship matters, juvenile offender cases, rent cases, house rent control, recovery of insurance amounts, maintenance cases, torts, damages for personal injury, detention without trial, etc. In the State of Bombay there has been some initial good work done by the Bombay Legal Aid Society which is a registered body since 1930. The Government of Bombay gives it a small grant of Rs. 1,200 per annum and its funds are augmented by membership subscriptions, donations and costs recovered in court. The society forms panels of free legal aid lawyers in all court areas of the State and arranges for assignment of work to them. But all this only touches the fringe of the problem. In the State of Madras, the State Bar Federation has formulated legal aid schemes for the metropolis and the mofussil on a voluntary basis to be initially enrolled by committees of the various Bar Associations under the superintendence of the central committee of the Bar Federation. Panel of lawyers is formed for each area. Madras is the infant-in-arms while Bombay is the growing baby. The movement wants regularised funds, regularised personnel and legal aid panel of lawyers to make it all a success. Public co-operation, Government help and hearty work of Bar Associations are all very necessary. The Government of Bombay appointed a committee under the presidentship of Mr. Justice Bhagwati in 1949 but the recommendations of that committee have yet to be implemented. Though it is best to sponsor private legal aid of the American pattern, yet in economically poor India, official aegis alone can give impetus to the movement, which is ever so essential at any rate in the initial stages. Public opinion is slow to move in India for such social services as legal aid. The Government of India should take note of the recommendations of the Justice Bhagwati Committee and accede to the request made by the Bombay Legal Aid Society for a comprehensive federal plan of legal aid in the whole of India on a statutory basis. We will recall the words of Mr. John Allen Hamilton: "Modern conditions do not admit of solving of legal aid problems through the disunited efforts of individual attorneys than they admit of solving of the problem of poverty through individual donations to street beggars" and so we would exhort the Bar, the public and the State to make a concerted and successful effort at solving the legal aid problem which is more now a constitutional necessity than a mere moral missionary or social service. It is the only way for meeting the just rights of the needy litigant for legal redress.⁶⁹

Right to Legal Aid under Art. 22 (1).

In Art. 22 (1) the opportunity for securing legal aid is alone guaranteed. The state does not extend legal aid as such but only should allow all reasonable facilities to the person arrested and detained in custody. The right to consult arises soon after arrest. The words "as soon as may be" indicates that the arrested person must not only be informed of the grounds early

69. *Vide* footnote 67

enough but he should have the opportunity to consult for his defence a legal practitioner. The choice of counsel is entirely left to the arrested person. The right under Art. 22 (1) arises for action under the ordinary law. But in Art. 22 (5) where action is taken under any law providing for preventive detention the detenu is guaranteed only "the earliest opportunity of making a representation against the order".

This representation may be allowed to be in person or through counsel. Detention laws also generally give a hearing to the affected person before final orders are passed, *vide* Sec. 10 Cl. (1) of the Preventive Detention Act, 1950 (Act IV of 1950) as amended up to 1st March, 1951.

Section 340 (1), Cr.P.C.—Under section 340 (1), Cr.P.C., any person accused of an offence before a criminal court or against whom proceedings are instituted under this Code in any such court, may as of right be defended by a pleader. Thus an accused is entitled to be represented by counsel.⁷⁰ If this right is denied a retrial can be ordered.⁷¹ The date of hearing must be furnished to the accused to arrange for his legal aid.⁷² Full opportunity must be extended to the accused to get proper legal assistance for cross-examining the prosecution witnesses.⁷³ It has to be pointed out that the services of counsel are necessary even when witnesses are examined in chief not only to check leading questions, but to prevent irrelevant evidence being recorded.⁷⁴ A Magistrate will be acting with material irregularity if he holds a trial at a place where the accused are totally incapable of making a proper defence and are deprived of the opportunity of being represented by counsel.⁷⁵ The court sitting on a Sunday though in itself an illegality if it further prejudices the accused and deprives him of the aid of counsel who may refuse to appear on a holiday, a conviction in such a case will have to be set aside.⁷⁶ An appellant also is entitled to be heard through his pleader.⁷⁷ The right of aid by counsel is not only to be in court but the right of consultation with his lawyer does exist even while he is in custody.⁷⁸ An accused in remand must be allowed reasonable contact with his counsel.⁷⁹ The choice of pleader has to be left to the accused⁸⁰ and no court can dictate in this regard.⁸¹ There is a rule providing for employment of counsel by Government in an enquiry before a Magistrate. But nothing prevents it being done. A Sessions Judge engaging counsel for defence (in capital or other cases) has to do so with the express or implied consent of the latter and the court has no authority to force upon the accused the services of an unwanted counsel⁸² [*vide* Criminal Rules of Practice (Madras) 1931, Rr. 117, 157 to 160, 160-A as to appointments of Advocates for the defence of accused who have no advocates of their own].

A court is also bound to hear arguments offered at any criminal trial or proceeding.⁸² It is not a question of indulgence but of right based on the

70. *Nekhila Jha v. Queen Empress*, (1900) 27 Cal. 656.

71. *Nanak v. Crown*, 1877 Punj. Re. No. 9, Cr.P.C. 23.

72. *Emperor v. Giraud*, 25 All. 375.

73. *In re Rangasami Padayachi*, A.I.R. 1916 Mad. 933.

74. *Mannargan v. Emperor*, A.I.R. 1925 Mad. 1153.

75. *Mewalal v. Emperor*, A.I.R. 1918 Pat. 197.

76. *Baban Daud v. Emperor*, A.I.R. 1915 Bom. 254.

77. *Rajkumar Singh v. Tincowri Mazumdar*, 12 C.W.N. 248.

78. *In re Llewelyn Evans*, A.I.R. 1926 Bom. 551.

79. *Kailasnath v. Emperor*, A.I.R. 1947 All. 436; *Sunder v. Emperor*, A.I.R. 1930 Lah. 945.

80. *In re James Fitzgerald*, 1896 Rat. 861.

81. *Murid Hussein v. Emperor*, 39 Punj. L.R. 33.

82. *Ibid.*; *Malik v. Emperor*, A.I.R. 1925 All. 282.

elementary principle that no order ought to be made to a man's prejudice without hearing him.⁸³ It may be stated that it is even ~~an~~ improper to suspend a pleader before the close of a case as grave injustice might be caused to the clients by depriving them of his services.⁸⁴

There is one provision in the Punjab Public Safety Act, 1947, providing for real legal aid. Sec. 37 (3) of the Act II of 1947 provides: "If it appears to the court that an accused person has had a reasonable opportunity of engaging a pleader and has neglected or omitted to do so, and if in the opinion of the court, it is necessary for the purpose of justice that such accused should be defended by pleader, the court may direct any person appointed to be a District Pleader, whose name appears in a panel maintained by the District Magistrate for this purpose, to appear before it and conduct the defence of the accused. Any person so directed shall receive remuneration according to a scale to be laid down by the Provincial Government and any sum so paid to him may, if the District Magistrate so directs, be recovered from the accused as arrear of Land Revenue."

At present, the High Court Rules and circular orders alone provide free legal aid at state expense in capital cases. Such aid should be made available by state to poor accused involved in any warrant case, at any rate in cases of grievous hurt, robbery, dacoity, rape, etc. Even the civil judiciary must be empowered to appoint at state expense counsel as *amicus curi* in cases where the judge feels it is very necessary in the interests of justice in cases requiring the skilled assistance of a lawyer and where very poor litigants are involved. Needless to add the state should supply free legal aid particularly in cases of preventive detention.

Judicial Interpretation.

In *Deodat Rai v. State*⁸⁵ it was held that Art. 22 (1) had no retrospective operation as the words used are "who is arrested" and not who has been arrested. Further the words "shall be detained" and "shall be denied" suggest only futurity. The right to claim legal advice and help arises only after arrest. It is not necessary he should be detained. Even if he is released on bail he can claim a continuing right for legal aid. If he is denied such legal aid Art. 22 (1) is violated and he is entitled to be released.

In *State of Punjab v. Ajaib Singh*,⁸⁶ the Supreme Court classified arrests into two broad categories: arrests issued by a warrant of court and arrests otherwise than by such warrants. The latter category no doubt calls for greater protection. The requirement of Art. 22 (1) that no person who is arrested shall be detained in custody without being informed as soon as may be of the grounds of such arrest indicates that the clause really contemplated an arrest without a warrant of court for, a person under a court's warrant is made acquainted with the grounds of his arrest before the arrest is actually effected. The right to consult a legal practitioner of his choice is to enable the arrested person to be advised about the legality or the sufficiency of the grounds of his arrest. The language of Art. 22 (1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as one effected otherwise than under a warrant issued by a court on the allegation

83. *Emperor v. Iboo*, 1 Cr.L.J. 760: 6 Bom. L.R. 665.

84. In re *Kristo Lall Nag*, 10 Cal. 256.

85. A.I.R. 1951 All. 718.

86. A.I.R. 1950 S.C. 10: 8 D.L.R. (S.C.) 35.

or accusation that the arrested person has, or is suspected to have, committed or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the state interest.

In *Asha Ram v. State*,⁸⁷ it was posited that the grounds supplied to a detenu must be connected with the order of detention. If it is found that they are not so connected, it cannot be said that they satisfy the requirements of Art. 22 (1) (3) (5). The detenu can then contend that grounds such as "attempts at breaking breach of the peace" or "to help a person to go underground" do not come under "maintenance of public order" and therefore no preventive detention could lie in law. Breach of peace affects only a few and not "public order" as such.

A complainant cannot take advantage of Art. 22 (1) and request that a case be transferred to a non-panchayat court on the ground that the accused is denied legal aid in the panchayat court.⁸⁸ Art. 22 (1) confers a right to be defended by counsel, only on a person "arrested" and "detained in custody" which could not be the case in the instant reference. The complainant can in no sense come under that caption.

In *Janardhana Reddy v. State of Hyderabad*,⁸⁹ it was held: "It cannot be laid down as a rule of law that in every capital case where the accused is unrepresented the trial should be held to be vitiated and that a court of appeal or revision is not powerless to interfere if it is found that the accused was so handicapped for want of legal aid that proceedings against him may be said to amount to negation of a fair trial."

In *Deodat Rai v. State*,⁹⁰ already cited it was held that it was not necessary to show that a person arrested under a certain act was actually denied the right of defence by a legal practitioner but that it was sufficient that the act impugned itself denied the arrested person the right.

In *Inderjit Singh v. State of Delhi*,⁹¹ it was pointed out though the proviso to Cl. (2) of S. 5 of the U. P. Goondas Act of 1932 is not an absolute bar to the person arrested under the Act being represented by counsel of his choice, yet in so far as this proviso makes such representation a matter of discretion with the advising judges this proviso must be held to infringe Art. 22 (1). The restrictions also were found to be unreasonable offending Art. 19 (1), Cl. (d) and (3) in that the person proceeded against had no right to be present when witnesses were examined, had no right to cross examination then and had not even the right to call his own witnesses. Such secret procedure without the elementary safeguards to the accused was held wholly *ultra vires*.

In re *Pandurang*⁹² the effect of the words "as soon as may be" was considered. It was observed that S. 7 of the Detention Act, 1950, wherein also the same expression occurs, there is no time limit fixed. In a certain measure and degree it is left to the executive but the time taken to furnish the grounds must be a reasonable time, reasonable in the circumstances of each case and that it is impossible to lay down a definite and unchangeable yardstick by which the court must judge as to whether the time taken in a particular case was reasonable or not. But S. 7 of the Preventive Detention Act, 1950, as

87. A.I.R. 1950 All. 709.

88. *Lal Bachan Singh v. Suraj Bali Singh*, A.I.R. 1952 All. 924.

89. A.I.R. 1951 S.C. 217-222.

90. A.I.R. 1951 All. 718.

91. A.I.R. 1953 Punj. 52.

92. A.I.R. 1951 Bom. 30.

amended by the Preventive Detention (Second Amendment) Act, 1952 (S. 6) prescribes five days from the detention order as the upper limit for the purpose.

The right of an accused person to consult his legal adviser and to be defended by him has been put on the highest footing ever since the Constitution came into force on 26th January, 1950. That being the true position in *Moti Bai v. State*,^{92a} certain propositions were laid down as following axiomatically from Art. 22 (1). They are (1) that after his arrest the accused has a right to be consulted by a legal adviser of his choice and to be defended by him.

(2) In order that such consultation may be effective, interviews must be allowed to his counsel, when asked for out of the hearing of the police though in their presence.

(3) That such a right must of course not be abused and must be granted subject to reasonable restrictions as to time and convenience of the police authorities, no less than that of the party seeking the interview. It must be clearly understood, however, that the police must not in any way obstruct such interviews on arbitrary or fanciful grounds with a view to depriving the accused of his fundamental rights.

In *Erinmal Ebrahim Hajee v. Collector of Malabar*,^{92b} Sec. 48 of the Madras Revenue Recovery Act was declared *ultra vires* of Art. 22 (1) and (2) since under it the defaulter had been denied all right of being heard. He had been also deprived of all right of engaging a legal practitioner to appear on his behalf before the Collector, the arrest warrant issued by the Collector being final and appealable. Section 46 (2) of the Income-tax Act also is *ultra vires* in so far as it empowers the Collector to proceed under Sec. 48 of the Revenue Recovery Act for arrears of income-tax. The arrest order when issued by an executive officer should be free from arbitrariness. There is undoubtedly indication in the language of Art. 22 (1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority.

The right to consult counsel and be defended by him involves the necessary interviews by counsel with detenu out of hearing of police though within their presence.^{92c} If a Magistrate takes up a complaint under Sec. 190 (1) (c) of the Cr.P.C. for an offence under S. 426, I.P.C., and himself goes to the spot and records evidence ignoring the provisions of S. 340 (1), Cr.P.C., and Art. 22 (1) without giving the accused an opportunity to defend himself, engage counsel, cross-examine witness and lead defence, and the Magistrate further convicts the accused, the entire trial is vitiated under Art. 22 (1).^{92d}

Sufficiency of information as regards the grounds for arrest is paramount. The warrant of arrest must intimate to him not only the section of the offence but also the particular act done by him constituting the offence.^{92e}

Where two sets of licensed porters offering Satyagraha were arrested under S. 120 and S. 121 of the Railways Act, put in prison and tried summarily in jail precincts the very next day, they having been kept in the dark

92a. A.I.R. 1954 Raj. 241.

92b. A.I.R. 1954 Mad. 1091.

92c. *Moti Bai v. State*, A.I.R. 1954 Raj. 241.

92d. *Muneshwar Singh v. State*,

A.I.R. 1955 N.U.C. (Patna) 3268.

92e. *Vimal Kishore Mehrotra v. State of Uttar Pradesh*, A.I.R. 1956 All. 56.

as to the charge, date of trial and of their right to be defended by a lawyer under Art. 22 and S. 340, Cr.P.C., the procedure was vitiated.^{92f}

There is no constitutional right to be always represented by a lawyer in every case. That right exists only when there is jeopardy to personal freedom as under Art. 22.^{92g} Article 22 (1) cannot apply to an arrest under civil proceedings, viz. Rule 18 under S. 43 of the Co-operative Societies Act of 1912 which gives powers to the Chief Commissioner to arrest.^{92h}

The right to appear by counsel is not given in the Punjab Gram Panchayat Act. But since Art. 22 gives protection only against executive and non-judicial bodies, there is no illegality.^{92e} The right to contest in a civil case with counsel's aid is not a Fundamental Right.⁹²ⁱ

When an arrest is made under S. 48, Madras Revenue Recovery Act, the arrest is not for an offence committed or a punishment for defaulting in any payment and so Art. 22 does not apply.^{92j} To attack the same under Art. 21 is not correct. For under Art. 21 "procedure established by law" means procedure enacted by law made by the State, that is to say, the Union Parliament and the State Legislatures. When the law is valid in pursuance of which he is arrested following the prescribed procedure, the arrested person cannot complain of any infringement of any of the Fundamental Rights under Art. 19 (1) (a) to (e) or (G).^{92j}

An order of detention while the person is already under detention under the ordinary law awaiting trial is, to say the least, undesirable even though it may not be wanting in good faith on the part of the detaining authorities.^{92k}

There is no right to be represented by a lawyer apart from what is contained in Art. 22 (1).^{92l} An Adalati Panchayat is a court and as such cannot be controlled by Art. 22 (1) and (2) which are directed only against executive or other judicial authority.^{92l}

Article 22, Clause (2).

This clause stipulates that (1) every arrested person detained in custody shall be produced before the nearest magistrate within twenty-four hours of such arrest.

(2) The time taken for the journey from the place of arrest to the court house shall be deducted from the twenty-four hours aforesaid.

(3) Except under the authority of a magistrate there can be no detention in custody over twenty-four hours.

The object of this procedure is to ensure a magisterial scrutiny of the justification of detention and also afford opportunity to the accused to meet a judicial officer at the earliest opportunity so as to place before him his grievance, if any. Further, it ensures that the accused person need not feel

92f. *Hansraj v. State*, A.I.R. 1956 All. 641.

92g. *Nandilal Varma & Co. v. Ambalal G.* 60 C.W.N. 810: A.I.R. 1956 Cal. 476.

92h. *Dharam Chand v. Ladu Ram*, A.I.R. 1956 Ajmere 68: C.L.R. 1956 Ajmere 23.

92i. *Gurdial Singh v. State*, 59 Pun. L.R. 49, following A.I.R. 1953

S.C. 10: 1952 S.C.J. 606.

92j. *Collector of Malabar v. Erimmal Ebrahim Hajee*, A.I.R. 1957 S.C. 688: (1957) 32 I.T.R. 124.

92k. *Mohd. Ishaq v. U.P. State*, A.I.R. 1957 All. 782, relying on A.I.R. 1953 S.C. 451 and A.I.R. 1944 Pat. 354.

92l. *Digambar Aruk v. Nanda Aruk*, A.I.R. 1957 Orissa 281.

apprehensive of any undue and long harassment by the authorities, as he had to be produced before the nearest magistrate within twenty-four hours of his arrest. As it has been remarked by the Chief Justice of India in the *habeas corpus* petition of Dr. S. P. Mookherjee and N. C. Chatterjee.⁹³ "This court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law."

We may now consider the following provisions of the Code of Criminal Procedure:—

Section 61 states:

"No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of a magistrate under S. 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court."

Section 81 states:

"The police officer or other person executing a warrant of arrest shall (subject to the provision of S. 76 as to security) without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person."

Section 167 provides the authority to the nearest Magistrate to remand the accused on production by a police officer for a period not exceeding fifteen days, if he is so satisfied for reasons to be recorded that the investigation of the case deserves such remand.

Section 76 gives all the discretion to the Magistrate while issuing a warrant of arrest to direct release on specified security. The officer arresting can take such security, release the person after arrest and forward the bond to the Magistrate. The Magistrate's discretion is absolute in this regard. He may or may not include in the warrant the security-taking clause. This is so even in bailable offences.

While S. 61 provides the procedure for a police officer arresting a person without a warrant, S. 81 applies to a case of arrest under a court warrant. Only in the former case the twenty-four hours' limit is prescribed while in the latter it is production of the arrested person "without unnecessary delay." This is presumably so as it is a court warrant and there is a magisterial scrutiny before the warrant is ordered.

But Art. 22 (2) applies to every person "who is arrested". There is no distinction made between arrest without warrant or arrest with warrant. The time limit of twenty-four hours in Cl. (2) appears to apply to both cases. Therefore, to this extent S. 81, Cr.P.C., seems to suffer from repugnancy to Art. 21 (2). The words "without unnecessary delay" should be deemed to be limited to twenty-four hours by virtue of Art. 22 (2). Thus Art. 22 (2) is an improvement on the existing law and affords a guarantee against legislative encroachment in this regard, viz. custody with the police for a period exceeding twenty-four hours in any circumstances. But this view is questioned in *State of Punjab v. Ajaib Singh*.⁹⁴ It is submitted the

93. *Vide* 'Hindustan Times' dated 13—3—1953, p. 4, cols. 5 & 6

94. A.I.R. 1953 Punj. 10.

language of Art. 21 (2) is definite in this regard (*see* below for further comment). Sec. 167, Cr.P.C., is in tune with the latter portion of Art. 22 (2) —“no such person shall be detained in custody beyond the said period without the authority of a Magistrate.” But if it is an arrest under the law of preventive detention, Art. 22 (1) and (2) do not apply. Then it is only Art. 22 (5) which applies and governs the entire procedure.

Civil arrests under O. 38, R. 1; O. 21, R. 38 of the Code of Civil Procedure, contemplate a warrant in which the grounds are specifically stated. Arrests under special statutes like the Sea Customs Act of 1878, Forest Act XVI of 1927, etc., are arrests without warrant but it can only be effected in cases where a person is reasonably suspected of an offence under the Act and there is also in the Acts the provision for immediate production before a Magistrate.⁹⁵ So in all legislative enactments where arrests without warrant are specified, two conditions are stipulated: (1) there should be reasonable suspicion for the offence having been committed; (2) early and immediate production of the arrested accused before a Magistrate.

Judicial Interpretation

In *State of Punjab v. Ajaib Singh*,⁹⁶ the Supreme Court has laid down that the provision in Art. 22 that the accused person should within twenty-four hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under warrant issued by court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. It was further held: “In the case of arrest under a warrant issued by a court the judicial mind had already been applied to the case when the warrant was issued and therefore there is less reason for making such production in that case a matter of a substantive fundamental right.” It is also perfectly plain that the language of Art. 22 (2) has been practically copied from Secs. 60 and 61, Cr.P.C. which admittedly prescribe the procedure to be followed after a person has been arrested without warrant. The requirement of Art. 22 (1) that grounds should be furnished only indicates that it contemplates a case of arrest without warrant, as in arrest with warrant the purpose and grounds of the warrant are stated therein. Their lordships therefore concluded that both clauses in Art. 22 (1) and (2) apply only to cases of arrest without warrant. It is, however, submitted that the actual wording in Art. 22 (2) seems not to put such a restricted view. In a case where the liberty of a subject is involved, the literal words of the Article must be taken. The interpretation should be in favour of the liberty of a subject unless it is clearly prohibited. It will be perfectly healthy and quite in consonance with the principle of personal liberty if Art. 22 (2) is so construed as to apply also to arrests under warrant of court. At any rate there can be no pretext for a police officer to delay after arrest the production of the arrested person before the Magistrate ordering the arrest. The further scrutiny of the grounds and desirability of remand for further days always lies in the discretion of the Magistrate and thus no principle is jeopardised by applying Art. 22 (2) to arrests on warrant also. At any rate the wording of Art. 22 (2) clearly seems to warrant such a conclusion.

In *Prabhat v. D. C. Kumrup*,⁹⁷ it was held that an order of a remand could only be passed by a Magistrate sitting as a court. It is immaterial

⁹⁵. *Vide Ibid.*, for discussion.

⁹⁶. A.I.R. 1953 S.C. 10; 8 D.L.R.

35 (S.C.).

⁹⁷. A.I.R. 1952 Assam 167.

where such a Magistrate was sitting at the time of the passing of the order. Neither Art. 22 nor Sec. 167, Cr.P.C., requires the production of an accused person before a Magistrate on the occasion of a subsequent remand.

Detention without authority from Magistrate is quite illegal. To be arrested and produced before the Speaker of the Legislative Assembly to answer a charge of breach of privilege is *ultra vires* of Art. 22 (2) since the latter Article enjoins production before Magistrate within twenty-four hours of arrest.⁹⁸

Section 48 of the Madras Revenue Recovery Act was held *ultra vires* of Art. 22 Clauses (1) and (2) since the defaulter was given no right of hearing, or right of engaging counsel before the Collector whose arrest warrant for the arrears was deemed final and unappealable.⁹⁹ Sec. 46 (2) of the Income Tax Act was under Sec. 48 of the Revenue Recovery Act.⁹⁹

The actual time of arrest is material to judge if the police authorities did or did not comply with the requirements of Art. 22.¹

The actual time of arrest is material in order to judge whether the police authorities did or did not comply with the requirements of Art. 22.² Action can be taken under Sec. 3 of the Preventive Detention Act (1950) even in respect of matter as to which criminal prosecution has been or can be launched.³ Article 22 is only designed to give protection against the executive or other non-judicial authority.⁴ So it cannot be invoked in the case of statutes like the Punjab Gram Panchayat Act and a challenge made that the accused is not allowed to be defended by counsel of his own choice in proceedings under that Act.⁴ There is no fundamental right to be represented by lawyer in Law Courts.⁵

Freedom of speech guaranteed by the Constitution is subject to the restriction validly placed upon it by the Preventive Detention Act in the interests of public order, peace and tranquillity.⁶ It would be a question of fact in each case whether the views expressed are of the one kind or the other. This test in all cases would be whether there is any "real" and "genuine" or as it has been sometimes described "proximated" and "rational" connection between the acts complained of and the apprehension of the disturbance of public peace, order and tranquillity likely to result therefrom.⁶

In the instant case⁶ one of the grounds, "spreading of disaffection against a Government" has been repeatedly held to be the right of every citizen in a democratic Government subject to the condition that there should be no advocacy of violence or incitement to use violence or resort to other illegitimate means. The detention order was declared void though other grounds mentioned in the notice under Sec. 7 of the Preventive Detention Act were

98. *Gunapathy Keshav Ram v. Nafissul Hussain*, A.I.R. 1954 S.C. 636. See *Prem Dutta Palwal v. Supdt., Central Prison, Agra*, A.I.R. 1954 All. 315.

99. *Erimmal Ebrahim v. Collector of Malabar*, A.I.R. 1954 Mad. 1091.

1. *Shrawan Kumar Gupta v. Supdt. District Jail, Madura*, A.I.R. 1957 All. 189 (D.B.).

2. A.I.R. 1957 All. 189; 1957 All. L.J. 152.

3. *Naren Babu v. State of W. Bengal*, A.I.R. 1957 Cal. 4.

4. *Gurdiāl Singh v. State*, A.I.R. 1957 Punj. 149; I.L.R. (1957) Punj. 334.

5. *Digambar Aruk v. Nanda Aruk*, A.I.R. 1957 or 281; I.L.R. (1957) Cut. 485.

6. *Mohd. Ishaq Ilmi v. U. P. State*, A.I.R. 1957 S.C. 782; 1957 Cr. L.J. 1361, relies on A.I.R. 1957 S.C. 164

relevant. To order detention while the person is already under detention under the ordinary law awaiting his trial is, to say the least, "undesirable" even though it may not be wanting good faith on the part of the detaining authorities.⁶

Article 22, Clause (3)

This clause merely provides that the rights extended under Clauses (1) and (2) of Art. 22 shall not apply—

(1) to an enemy alien;

(2) to any person who is arrested or detained under any law providing for preventive detention.

The above two categories of persons are therefore not (1) given the right to consult nor to be defended by a legal practitioner; (2) nor are they entitled to be supplied with grounds for their arrest "as soon as may be"; (3) nor can they demand that they be taken to the nearest Magistrate within twenty-four hours of their arrest; (4) or that a Magistrate has any power to limit or extend the period of custody. To deny an alien enemy these rights is understandable as he is an enemy to our "State".

While the alien or the detenu has no right to consult or engage a lawyer on his behalf, in the case of detenu at any rate by virtue of Art. 22 (5) there is a provision for a right of representation to the Advisory Board but this again does not extend to the detenu the right to cross-examine witnesses^{6a} nor to demand as of right appearance through a lawyer. This may indeed appear hard since even under Regulation 18-B under the war-time measure the English Emergencies Power (Defence) Act, 1939, the detenu was given a right to call witness and engage a solicitor; Art. 22 (5) appears to extend only "representation" and not an actual "hearing" before the detaining authority.^{6b} S. 10 (1) of the Amended Preventive Detention Act, however, empowers the Advisory Board to hear the detenu in person, if necessary. In other words, it is left to the Board's discretion and the detenu has no right as such to be heard.

An alien enemy is a person who voluntarily resides or carries on business in enemy territory.^{6c} It includes not only subjects of a state at war with India but also Indian subjects voluntarily residing or trading with an enemy country.^{6d} The legislative entry is entry 17, List 1, Schedule VII of the Indian Constitution. In England an alien enemy has no right of *habeas corpus* and therefore can be arrested and imprisoned under the Royal Prerogative.^{6e}

But in India even an alien enemy can ask for protection under clauses 4 and 5 of Art. 22 if arrested under a law of preventive detention. But this right is subject to legislation by Parliament. Arts. 21 and 22 apply to citizens as well as non-citizens. But Art. 22 (3) exempts only Art. 22 Cls. (1)

6a. *A. K. Gopalan v. State of Madras*, (1950) S.C.J. 174 (240): 6 D.L.R. 313 (S.C.).

6b. *State of Bombay v. Atma Ram*, (1951) S.C.J. 208 (223): (1951) 1 M.L.J. 389; 6 D.L.R. (S.C.) 216.

6c. *Sov. Fracht v. Van Vaders*, (1943) A. H. (L. 203.

6d. *C. F. Vandy v. Adams*, (1942) Ch. 155.

6e. *R. v. Scheiver*, (1759) 2 Burr. 765.

to (2) to an enemy alien. A friendly alien can, however, claim the protection of Art. 22 (1), (2).

Judicial Interpretation

In *Inderjit Singh v. State of Delhi*,^{6f} it was held that externment or banishment order was not in the nature of preventive detention. The object of the former is punishment while the latter is preventive. Detention means that the detenu is at liberty to go nowhere. So the order under the U.P. Goondas Act I of 1932 in the instant case externing the person only from entering Delhi is not preventive detention and so Art. 22 (5) will not apply in that case.

In *Deodat Rai v. State*^{6g} the arrest made was not according to the form prescribed for preventive detention and as U.P. Act V of 1949 was preventive law the arrest made did not rob the petitioner of his right to defence by a legal practitioner.

Where a person is already detained in jail awaiting a trial in respect of certain offences alleged to have been committed by him, a warrant issued under the Preventive Detention Act would be invalid.^{6h} Where the main ground of detention is investigation of a crime, then also the detention under the Preventive Detention Act would be colourable, improper and amount to circumventing the provisions of the Constitution.⁷

In *Rex v. Basudeva*,⁸ it was held that preventive detention being a serious invasion of personal liberty, the power to make laws with respect to it, was strictly limited by the condition that such a detention must be for reasons connected with the maintenance of public order the connection contemplated being real and proximate, not far-fetched or problematical.

In *Heralp Singh v. State*⁹ it was held that security demanded under the Provincial Maintenance of Public Order Act, to prevent a person from acting in any manner prejudicial to public safety or the maintenance of public order, would result in imprisonment under S. 123-A. But such detention could not be preventive for the purposes of maintenance of public order as the imprisonment under S. 123-A was occasioned only by the failure to furnish security.

Article 22, Clause (4).

Article 22 Cl. (4) authorised the formation of Advisory Boards consisting of persons of the status of High Court Judges. It is this Board that can authorise detention for more than three months. If they do not report to that effect, the detained person cannot be kept in detention over the three months' period and should be forthwith released. The Board should record its opinion for sufficient cause to enable detention for a longer period. But the maximum period of detention is to be regulated by Parliament under Art. 22 Cl. (7) (b). Detention for over three months may not only be the result of the Board's recommendations but it may also be so by virtue of any law of detention enacted by Parliament under Art. 22 Cl. (7) (4) (b).

6f. A.I.R. 1953 Punj. 52.

6g. A.I.R. 1951 All. 718.

6h. A.I.R. 1950 Hyd. 66.

7. *Narayanamma v. Hyderabad State*, A.I.R. 1950 Hyd. 68.

8. A.I.R. 1950 F.C. 67; 1950 S.C.J. 47.

9. A.I.R. 1950 All. 562. See also 1950 S.C.J. 47.

Clause A: Advisory Board.

This function of the Board is only to report to the Government after scrutiny of all papers and the representation made by the detenu, if any, under Cl. (5) whether detention is necessary for over three months. The Board should record sufficient reasons for the same and should restrict its recommendation for enhanced period within the limits set out in Cl. 7 (b).¹⁰ Though the Government accept the report of the Board, if the detention is not valid on its merits, it will be void. In other words the detention must not be *ultra vires* of the Constitution in which a *habeas corpus* writ can lie despite the Advisory Board's recommendation.¹¹

The court can confirm the Board's order as *intra vires* or set it aside on the ground that it is *ultra vires* of the Constitution or that the order is *mala fide*. It is not necessary the detenu must wait till the Advisory Board furnished its report to resort to the *habeas corpus* remedy. He can do so even before his case is placed before the Board.¹² The power of the High Court under Art. 226 is not in any way controlled by the constitution of these Advisory Boards. Conversely a disposal of the *habeas corpus* application under Art. 226 can also have no effect on the applicant's case before the Advisory Board. For the court after all functions in distinctly different areas and possesses different powers.¹² Once the Board recommends against an order of detention it is the duty of the Government to respect the recommendation. It will be illegal then for the Government to detain the person beyond the three months under Art. 22 (4). If the Board states that there is no case for detention, it is equally incumbent on the Government to release the detenu forthwith even prior to the expiry of the three-month period.

In fact Sec. 11 (2) of the Amended Detention Act (IV of 1950 as amended by Acts L of 1950, IV of 1951 and LXI of 1952) postulates thus: "In any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

The report of the Board must, however, be before the expiration of three months from the date of detention. Else there may be an abuse of the provision and the Board may indefinitely postpone its recommendation and the guaranteed safeguard to the detenu except on the recommendation of the Board gets nullified by the gross abuse of its power or its negligence. It is also incumbent on the Government not to delay papers being sent to the Board forthwith. Else the safeguard will be a mockery.

Clause B.

The clause provides that Cl. (4) does not apply to cases coming under laws made by Parliament under Cl. (7) (a) and (b). The Supreme Court has held in *Krishnan v. State of Madras*¹³ that so long as Parliament does not choose for the maximum under Art. 7 (b) it is constitutional for Parliament to provide that the detaining authority can detain a person for any length of time if the Advisory Board has reported that there is sufficient cause for detention.

10. *Ananta v. State*, A.I.R. 1951 Orissa 27.

11. *Lal Bahadur v. State of Bihar*, (1950) 5 D.L.R. 8 (Pat.).

12. *Ramanlal v. Commr. of Police*,

(1951) 56 C.W.N. 42.

13. (1951) S.C. 621; (1951) S.C.J. 453; (1952) 7 D.L.R. 1 (S.C.): A.I.R. 1951 S.C. 101.

Successive Orders if Valid and bonafide.

We have seen how *mala fide* can be found in an order of detention. Once a court has declared the order to be unjust and illegal, a fresh order of detention on the same or similar grounds will be lacking in *bona fides*.¹⁴ The validity of such successive orders circumventing prior decisions in respect of prior order of detention had been raised in several cases. Where an order was invalid or was irregular in form, a fresh order of detention in a valid form or under a fresh legislation¹⁵ would not be *mala fide*.¹⁶ If the prior order suffered on account of a technical defect there is no bar in Art. 21 or 22 for issuing a fresh order.¹⁷ By S. 11 (2) of the amended Preventive Detention Act no fresh order on the same ground can be passed once the Advisory Board reports against the sufficiency of cause for detention. It may be also stated that S. 9 (1) of the Act enjoins reference to the Advisory Board even in case of successive orders.¹⁸ The question of *bona fides* of successive orders had been finally settled by the Supreme Court in *Narayan Singh v. State of Punjab*.¹⁹ This decision may be summarised thus:

1. If there is a Court decision on *merits* that the detention order is without justification, any subsequent order of detention on the *same* grounds is clearly *mala fide*. But if on the other hand the prior decision merely held that the law under which the order was made was invalid or that the order was irregular in form, in such event a fresh order of detention can lie under a new legislation¹⁵ or in valid form.¹⁹

2. If it is a pending proceeding—before the court directs the release of the detenu on account of invalidity of the order of detention, a new and valid order directing his detention is produced the court cannot release the detenu merely on account of the flaw in the prior order. But if in such a case the court is perfectly satisfied that the latter order is not *bona fide* but was a ruse to defeat the pending petition, *mala fides* is made out and the detenu has to be released. But if there is no proof of such bad faith the latter order cannot be sustained.²⁰ In case the subsequent order is not brought to the notice of the court in the pending proceeding it is manifest that the latter order is *mala fide* intended to flout the possible adverse order of the court.²¹ It may be here observed that Sec. 13 (2) of the Preventive Detention Act as amended by Act LXI of 1952 postulates that when a preventive detention has expired or been revoked a fresh order may be made if there are fresh facts arising after the date of such expiry or revocation. This implies also that on the expiry or revocation of an order, no fresh order on the very same ground can be made.

Advisory Boards under Preventive Detention Act.

The Preventive Detention Act, 1950, provides in Ss. 8 to 11 for the constitution of Advisory Boards, reference to such Boards, then procedure and

14. *Prahlad v. State of Orissa*, A.I.R. 1950 Or. 107 (F.B.).

15. *Ananta v. State*, A.I.R. 1951 Orissa 27.

16. *Bhupendra v. Government of West Bengal*, A.I.R. 1949 Cal. 633; *Basanta v. Emperor*, A.I.R. 1945 F.C. 18; *Ramadhar v. State*, A.I.R. 1951 All. 18.

17. *Gopalan v. State of Madras*, (1950) S.C.J. 174 (195): 6

D.L.R. 313 (S.C.).

18. *Zamir v. Emperor*, A.I.R. 1948 All. 285; *Yusuf v. Rex*, A.I.R. 1950 All. 69 (76).

19. (1952) S.C.J. 111: A.I.R. 1952 S.C. 106 following *Basanta v. K.E.*, (1945) F.L.J. 40.

20. *Ibid.*

21. *In re Gopalan*, (1952) 2 M.L.J. 690.

final confirmation of their reports by Government. The Central and each State Government are empowered to create such Boards wherever necessary. They are to be manned as outlined already in Art. 22 (4) by three persons of the status of High Court judges to be appointed by the respective Governments. One of these three who is or has been a judge of a High Court is to be appointed chairman. In the case of C States the chairman has to be drawn from the High Court judges of a Part A or Part B State. In every case of detention the concerned Government should within thirty days of the passing of the detention order place before the Advisory Board the grounds of the order. The detained person may also send his representation against the order to the Board. If the order has been made by an officer the report of such officer under Sec. 3 (3) shall also be placed before the Board. The Board is to consider all the above and may also call for further information as it may deem proper from the Government or any other person. The latter shall comply with the demand of the Board. If the person concerned desires to be heard or if the Board considers it essential to hear him, the Board will hear him in person. Thereafter the Board shall submit its report to the Government concerned within ten weeks of the date of detention. The report shall include the opinion of the Board as to whether or not there is sufficient cause for detention of the person. If there is difference of opinion among the members of the Board, the majority opinion shall prevail. A detenu has no right to appear by any legal practitioner in any matter concerned with reference to the Advisory Board. The proceedings of the Advisory Board and its report excepting that part of the report in which the opinion of the Advisory Board is specified, are confidential. If the Board's opinion approves of the sufficiency of the same cause for detention, the concerned Government *may* confirm the detention of the person for such period as it deems fit. If the Board's opinion records that no sufficient cause for detention exists the appropriate Government shall at once revoke the detention order and release the detenu. The above is only a summary of the Detention Act.

The detailed provisions of the Detention Act are separately dealt with hereunder after the end of the commentary on Art. 22, Cl. (7).

Judicial Interpretation.

In *Baisnab Patnaik v. State*²² it was held that the qualification for appointment as a High Court Judge as contemplated by Art. 22 (4) and Art. 165 (1) referred only to those qualifications described in Art. 217 (1) and did not refer to the age-limit fixed in Art. 217 (1). The age-limit is not one of the qualifications.

In *Umedsing v. State*,²³ it was held that detention over three months even by a day was invalid unless the Advisory Board recommended extension within these three months. It was further pointed out that S. 10 (1) of the Preventive Detention Act, 1950, was imperative in demanding the Board's Report within ten weeks from the date of the order of detention. If the Board did not submit its report within time further detention was clearly illegal.

In *Krishnan v. State of Madras*,²⁴ it was held that the Amending Act

22. A.I.R. 1952 Orissa 60: 16 Cut. L.T. 366.

23. A.I.R. 1952 Sau. 51: *Vide also Dabhi Harisingh v. State*, A.I.R.

1953 Sau. 63.

24. (1951) S.C.R. 621: A.I.R. 1951 S.C. 301: (1952) 7 D.L.R. 1 (S.C.).

IV of 1951 to the Preventive Detention Act, 1950 was not *ultra vires* merely because it authorised detention to be continued beyond one year as it was saved by Cl. 4 (b) read with Cl. 7 (b) of Art. 22. The Amending Act was a law substantially in accordance with Cl. (7) (a)-(b) for though this Act did not in terms fix a maximum period of detention, it extended the duration of the old Act till April, 1952. It being a temporary statute, the date of the expiry of the Act practically in substance prescribes the maximum period of detention as contemplated by Cl. (7) (b). Art. 22 (4) (b) is independent of the provision in Cl. 4 (a). Cl. 7 (a) in Art. 22 is an enabling provision and the word "and" is to be interpreted disjunctively, while Cl. 7 (b) is permissive and does not make it obligatory on Parliament to fix the maximum period.

On the expiry of an Act, pending proceedings shall terminate and new proceedings can be initiated. But this does not mean that a valid prior order will *ipso facto* cease to have effect on the expiry of the statute.

In *Makhan Singh v. State of Punjab*,²⁵ it was held that the order fixing the period of detention in the initial order of detention made under S. 3 of the Act and before the case was placed before the Advisory Board for its report was void as contravening Art. 21 as it was contrary to the scheme of the Amendment Act and as it would also tend to prejudice a fair consideration of the detenu's case when placed before the Advisory Board. The failure to follow the procedure established by 'law' entails quashing of the alleged order. It may be noted that while in *Krishnan's case*²⁶ it was opined that Act IV of 1951 was not invalid merely because of its omission to fix a maximum period since the Act itself was temporary. In *Makhan Singh's case*²⁵ it is clear that it is obligatory on the detaining authority, the Government, to fix the period of detention only after the receipt of the Board's opinion. It would appear therefore the words "as it thinks fit" in S. 11 of the Detention Act would enjoin the Government to exercise its discretion by fixing a specified date within the duration of the Act itself upon which the order is made. Else the period of detention is left indefinite and it may continue any length of time by the simple device of extending the duration of the temporary Act from time to time. This view was accepted in the undermentioned cases.²⁷ But in *Prahlad v. State of Bombay*,²⁸ the Bombay High Court was of the view that the words "such period as it thinks fit" empowered the Government to keep the person in detention for any indefinite period subject to the limitation of the duration of the temporary Act. This controversy was remedied by S. 3 of the Preventive Detention Amendment Act, 1952, which validates orders of detention for an indefinite period and provides that all such orders shall continue till the expiry of the principal Act, i.e. Act XI of 1950 as amended by subsequent Acts. The Amending Act XXIV of 1952 has extended the life of the Act till October, 1952. Finally in *Dhattraya v. State of Bombay*,²⁹ it was held that an order of detention would not be invalid merely because no definite period of detention had been fixed in the order under S. 11 of the Act and that even where the order under S. 11 of the Act specified a period of detention, in view of S. 21 of the General Clauses Act the detaining

25. (1950) S.C.R. 88 (212), Sastri, J.: 7 D.L.R. 76 (S.C.).

26. See *Krishnan v. State of Madras*, A.I.R. 1951 S.C. 301.

27. *Baskir v. State*, A.I.R. 1951 All. 357; *Jaya Singh v. The State*, A.I.R. 1951 Pepsu 1.

28. A.I.R. 1951 Bom. 18; See also *Ram Adhar v. State*, 1951 All. 18; *Pyarelal v. State*, A.I.R. 1952 All. 180.

29. S.C. Petition 683 of 1951 (unreported).

authority, before the expiry of the period initially fixed and before the release of the detenu, could direct the detention to continue for any further period subject to the overall limit of the Act itself.

Makhan Singh's case,³⁰ follows *A. K. Gopalan's case*³¹ in enunciating the principle that Art. 21 applies also to cases of preventive detention in matters not covered by Art. 22. It follows that if the detention is not in strict conformity with the law authorising detention, the detention is rendered invalid as it is not in accordance with the procedure established by law. Such instances have arisen in the following cases:—

1. Where the entire Board constituted under S. 8 (2) of the Act did not sit but only two of the three members considered the detenu's case.³²
2. Where grounds are not furnished to the detenu within a reasonable time as required under S. 3.³³
3. Where the detenu's case is not referred to the Board within the time fixed by S. 9 (1) even though the detenu may have obtained a temporary release under S. 14 (1).³⁴

The power of the Government for revocation of the order of detention under S. 13 of the Act is, however, untrammelled by any restriction. Ss. 9-10 do not constitute a prerequisite procedure to be followed for exercise of the powers under S. 13.³⁵

In *Teja Singh v. The State*,³⁶ it has been held that though S. 12 of the Detenu Act, 1950, lays down, under certain conditions mentioned in it, the maximum of one year can be the period of detention, it cannot by stretch of imagination be taken to have also laid down that where the detaining order made under Sec. 3 fails to give the period of detention, the detention would be deemed to have been ordered to be for the maximum of one year. The specification of the period of detention is one of the indispensable essentials that would go to make the order of detention legal and valid in the eye of law. In *Sham Rao v. Parulekar*,³⁷ the Supreme Court has held that S. 3 of the Preventive Detention Amendment Act, 1952, does not infringe the Constitution because Arts. 22 (4) and 22 (7) do not envisage the direct intervention of Parliament in a whole batch of cases. Parliament can prescribe the maximum period for a class taken as a whole as it has done in S. 3. Nor can it be said that S. 3 is repugnant as it fixes no time limit because the section specifies the exact period of detention, namely, till the expiry of the Preventive Detention Act, 1950, i.e. till 1st October, 1952. Nor is it repugnant to the Constitution on the ground that Parliament is enabled to continue detention indefinitely by the expedient of periodic amendments in the Act of 1950 because it has the power. In *Narayan Singh Nathawan v. State of Punjab*³⁸ the Supreme Court reiterated that Sec. 13 of the Detention Act provided that detention might at any time be revoked or modified and such revocation would not bar the making of a fresh detention order

30. *Makhan Singh v. State of Punjab*, (1950) S.C.R. 88.

31. (1952) 2 M.L.J. 690.

32. *Kishorilal v. The State*, A.I.R. 1951 Assam 169 (170).

33. *Tarapada De and others v. State of W. Bengal*, (1951) 6 D.L.R. 235; A.I.R. 1951 S.C. 174; 1951 S.C.J. 233.

34. *Kishorilal v. State*, A.I.R. 1952 Assam 167 (170).

35. *Pyarelal v. State*, A.I.R. 1952 All. 180 (181).

36. A.I.R. 1951 Pepsu I (Passey, J.).

37. A.I.R. 1952 S.C. 324.

38. A.I.R. 1952 S.C. 106; 7 D.L.R. 148 (S.C.).

under Sec. 3 against the same person. As in *habeas corpus* proceedings, the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of proceedings. In the absence of proof of bad faith, the detaining authority can supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf. The question of bad faith if raised would have to be decided with reference to the circumstances of each case but the observations in one case cannot be regarded as a precedent in dealing with other cases.

Advisory Boards have no power either under Sec. 8 of the Preventive Detention Act or Cl. 4 (a) of Art. 22 the right to determine validity of the detention order. It cannot oust the jurisdiction of the High Court to determine whether the grounds on which the detention was ordered satisfied the requirements of the law and if the initial order of arrest was illegal.^{38a}

Any detention under the P.D. Act which is but a temporary statute, must in the absence of anything to the contrary, be coterminous with the life of the Act. Hence though Sec. 11A of the P.D. Act provides the maximum period of detention to be twelve months from the date of detention, the controlling factor is the life of the statute itself.^{38b} But once, however, a fresh life is added to the temporary Act by a subsequent legislation, the original order of detention cannot be challenged on the score that it was for a period beyond the life of the temporary Act since the order as well as the consequent detention must be deemed to have been under the original Act.^{38b}

Extnment or banishment is not detention which means that the person externed is at liberty to go anywhere outside a particular area.^{38c}

Preventive detention under Art. 22 is with reference to executive authority and not to detention by an order passed by a judicial officer after a full trial.^{38d} The detention under S. 123, Cr.P.C., in default of furnishing security ordered under Sec. 118, Cr.P.C., is in one sense, no doubt, preventive but that does not offend Art. 22 at all.^{38d}

In *Amrit Bhattachariya v. The State*,^{38e} it has been held that there is nothing in the Constitution of India which imposes an obligation on a State Government when enacting a law restricting the movement of a citizen, to provide a safeguard similar to one providing for a reference to an Advisory Board under the Preventive Detention Act (IV of 1950) as amended. In the absence of such a constitutional obligation the question of reasonableness or otherwise of restrictions imposed on a citizen's movement must be determined without any reference to what are characterised as safeguards. Hence in the instant case it was held that Sec. 2 of the Assam Act V of 1947 which imposes restrictions on movement without providing a safeguard, namely reference to an Advisory Board is not *ultra vires* of the legislature and the

38a. *Prem Dutta Paliwal v. Supdt., Central Prison, Agra*, A.I.R. 1954 All. 315.

38b. *Ram Prasad Shaw v. Chief Secy., Government of W. B.*, A.I.R. 1955 Cal. 374.

38c. *Jiwan Lal v. State*, A.I.R. 1955 N.U.C. (M.B.) 5943.

38d. *In re Seetha Raman*, 1956 (1)

M.L.J. 232; 1956 C.W.N. 77, following A.I.R. 1953 All. 735. Distinguishing A.I.R. 1950 All. 560. See also *Shaik Kalesha v. State*, 1956 Andh. W.R. 450; *Mannava Venkayya v. K. Chinna Punniiah*, 1956 And. W.R. 485.

38e. A.I.R. 1953 Assam 77.

restrictions imposed cannot be regarded as unreasonable from the point of view of procedural and substantive law.

The Supreme Court has by majority decided in *Puranlal Lakhanpal v. Union of India*^{38f} that Cl. (4) of Art. 22 does not state that the Advisory Board has to determine whether a detenu should be detained for more than three months. What it has to determine is whether the detention is at all justified. The setting up of an Advisory Board to determine whether such detention is justified is considered as a sufficient safeguard against arbitrary detention under any law of preventive detention which authorises detention for more than three months. The matter before the Board is the question of detention of the person concerned and not for how long he should be detained. Clause (7) of Art. 22 is an exception to Clause (4). The expression "such detention" in Art. 22 (4) (a) refers to preventive detention and not to how long such detention is to be justified.

The opinion of the dissenting Judge (A. K. Sarkar, J.) that the words "such detention" must necessarily refer to detention for a period longer than three years and not to preventive detention *simpliciter*, is far-fetched. In that event Sec. 11 (1) of the Preventive Detention Act will become *ultra vires*.

The decision as to the period of detention must be left for the detaining authority. The reference to the Board is only a safeguard against executive vagaries and high-handed action.^{38f}

Article 22, Clause (5).

Right of Representation.—The right of representation by the detenu is specifically guaranteed in this clause. The detenu is further entitled to the "grounds of detention" to be supplied to him as soon as may be after the initial order of detention. Only on being furnished with these "grounds" is the detenu enabled to make the representation. The former is a necessary condition to be fulfilled by the Government. What is guaranteed is only right of representation and not a right to be heard by an independent tribunal.³⁹ No right to appear by pleader nor even a personal appearance to submit the representation is contemplated. The representation may be in answer to the grounds, preferred in writing and sent to the Board.

The right to be furnished with grounds is an elementary demand in a democratic state; otherwise the person detained is completely kept in the dark, which is neither fair, just nor becoming in a democracy. The next right of representation follows the grant of the first right. It is no good to know the grounds if the person affected is not given a redress. He may justifiably urge that the detention is wholly unjust or illegal. The representation allowed is against the order of detention as based on the grounds furnished. There is no remedy by trial and hence this right of representation (though meagre and circumscribed) is, however, valuable as that is the only method available to a person detained to establish his innocence. He can establish his innocence thiswise:

1. That the grounds on which the order has been made have no connection with the order of detention.

38f. A.I.R. 1958 S.C. 163: 1958 Cr. L.J. 283, refers to A.I.R. 1952

S.C. 27; A.I.R. 1952 S.C. 181.

2. Or, that the grounds furnished can have no connection with circumstances or classes of cases under which preventive detention could be sustained.³⁹

3. Or, the grounds are too vague to enable him to make the representation.⁴⁰

Extent of Jurisdiction of Court's Powers in cases of Detention.

The intervention of courts is possible in the following cases of preventive detention:—

1. (a) On the question of validity of the preventive detention law and the competence of the legislature to pass it.

This entails an examination as to whether the impugned Act is covered by the legislative entry relating to preventive detention.

(b) On the ground of the order of detention being *ultra vires* of Art. 22 of the Constitution.

In all these cases no question of reasonableness of the law arises or even the possibility of its abuse by the legislature or the executive. Once the legislation is found to be within the legislative ambit there can be no attack on it on the ground of "arbitrariness". At any rate no court of law can do so.⁴¹ It is left to the legislature goaded by an informed public to remove such defects. If the authority vested with the power of enforcing the legislation commits an abuse of the power, the act of the authority alone would be illegal and not the legislation itself.

2. On the question whether the subject-matter of the "grounds" of detention are at all relevant to the circumstances under which preventive detention could be supported in law, *viz.*, security of India or of a State, maintenance of public order, etc., *vide* Entry 3 of List III and Entry 9 of List I of Sch. VII of the Constitution.

This means no preventive law can traverse outside the ambit of the categories listed in these legislative entries. Thus there can be no grounds as "breach of the peace" as the legislative entry stops with "public order" and does not include categories as "breach of peace".

3. On the question whether "the grounds" supplied are at all relevant to the order of detention in question. The court may not enter into an investigation as to sufficiency of the material on which the detaining authority made the order. That is completely left to the subjective satisfaction of the authority concerned. But the court can examine the *bona fides* of the order and can set it aside in case *mala fides* is made out. In other words, the court can determine if the law of preventive detention has been used for any purpose other than that for which it is enacted.

4. On the question of sufficiency of the grounds so as to enable the detained person to make an effective representation. This definition does not mean "sufficiency of grounds" as basis for government's satisfaction but limits court's jurisdiction to the extent of scanning if the grounds are sufficiently stated so as to make it possible for the person to make an effective representation.

39. *Gopalan v. State of Madras*,
(1950) S.C.R. 88.

(1951) S.C.R. 167 (179) *Kania*,
C.J.: 6 D.L.R. 216 (S.C.).

40. *State of Bombay v. Atma Ram*,

41. *Vide* Footnote 39.

The court cannot enter into the merit of the basis on which the detaining authority satisfied itself before it passed the order.⁴² Thus in *Madanlal v. State of Bihar*⁴³ it was held that the High Court could not interfere merely on the basis that times had changed and further detention would be unjustified. Nor can it traverse regarding the truth or otherwise of the facts alleged in the grounds of detention. Only the Advisory Boards and not the courts, are competent to scrutinize the correctness of the statements made in the affidavits in support of the detention order.⁴⁴

Earliest opportunity for Representation.

Art. 22, cl. (5) stipulates (1) that the detaining authority shall "as soon as may be" communicate the grounds to the detenu, (2) and that the earliest opportunity for making a representation against the order shall be provided to the detenu.

The term "as soon as may be" means "as soon as feasible." In *State of Bombay v. Atma Ram* the term is explained thus: "The expression allows the authorities reasonable time to formulate the grounds on the materials in their possession. The time element is necessarily left indeterminate, because activities of individuals tending to bring about a certain result may be spread over a long or short period or a larger or a smaller area, or may be individuals. The time required to formulate the proper grounds of detention on information received, is bound to vary in individual cases."

Even in respect of the facility for "representation" the time limit is not definitely fixed. The expression used is "at the earliest opportunity". But in *Atma Ram's case* it was pointed out that the time for offering opportunity for making representation would come later than the time for communicating the grounds and that during the interval the authority might supply materials and particulars which would enable the detenu to make "a proper representation." In the instant case⁴⁵ the particulars were supplied to the detenu after the court had issued a *rule nisi* for *habeas corpus* and yet it was held that it was a case of "earliest opportunity have been given."

The question as to when the particulars should be furnished had been left hazy in *Atma Ram's case*. It was said, however, the second communication should be liable to be charged as not being within the measure "as soon as may be." What this means is that particulars could be furnished some time later than the grounds. But in *Ujjar Singh v. State of Punjab*,⁴⁶ where the particulars were furnished after an inordinate delay of four months it was considered as a denial of earliest opportunity to make the representation as guaranteed under Art. 22 (5).

The representation has to be made to the authority detaining the person. Art. 22 (5) is, however, silent as to when the representation should be made. In *Gopalan v. State of Madras*, it was held that it was not unconstitutional for a law to provide that representation was to be made to the detaining authority itself. However, in the amended Preventive Detention Act, 1951,

42. *State v. Maganlal*, (1952) 7 D.L.R. (260) Bom. See also *State of Bombay v. Atma Ram*, (1951) S.C.R. 167; *Bhimsen v. State of Punjab*, (1952) S.C.R. 18; (1950) D.L.R. 94 (S.C.).

43. (1951) 30 Pat. 716.

44. *Bhimsen v. State of Punjab*,

(1952) S.C.R. 18; 1950 D.L.R. 94 (S.C.).

45. (1950) S.C.J. 174, *Gopalan's case*: 6 D.L.R. 313 (S.C.).

46. (1951) S.C.J. 208 (217); A.I.R. 1952 S.C. 350; 7 D.L.R. 416 (S.C.).

Sec. 7 (1) stipulates that representation is to be made to "the appropriate Government."

Grounds to be Communicated.

There is a statutory and constitutional obligation on the part of the detaining authority to furnish to the detenu the grounds "as soon as may be" possible after the arrest. Grounds are the basis or the conclusions leading to the order drawn by the detaining authority from the "facts" or particulars with him regarding the detenu. There is similar obligation to furnish the grounds under Art. 22 (1), but in Art. 22 (5) the authority is given the further privilege under Art. 22, Cl. (6), of not disclosing such "facts" which it considers to be prejudicial to the public interest to disclose. "Facts" are the data on which the conclusions for the "grounds" are based. The authority is bound to disclose all the "grounds" though not all the "facts". But the communication to the detenu should contain all the grounds or conclusions which enabled the order of detention to be made with sufficient particulars or facts as are absolutely necessary for enabling the detenu to make an effective representation.⁴⁷ Sufficiency of particulars or facts and "all the grounds" are the criteria. In other words, the grounds furnished must be exhaustive though not the "facts". The right to receive the grounds is not independent but it is inextricably bound up and connected with the right to make representation.⁴⁸ It is no good merely reproducing the words of the section of the statute. What is needed is all the "grounds" and "sufficient particulars or facts." These facts may even be supplied subsequent to the communication of the grounds.⁴⁸ The grounds must show in which of the categories of prejudicial acts (*vide* entry 9 of List I) the suspected activity of the particular person is considered to fall.⁴⁸ In respect of the second right of being afforded "the earliest opportunity of making a representation" against the orders their Lordships of the Supreme Court opined: "This is not confined to only a physical opportunity by supplying paper and pen only. In order that a representation can be made the person detained must first have knowledge of the grounds on which the authorities concluded that they were satisfied about the necessity of making the detention order. It is therefore clear that if the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain the object. . . . While the grounds of detention are thus the main factors on which the subjective decision of the Government is based, other materials on which the conclusions in the grounds are founded could and should equally be conveyed to the detained person to enable him to make out his objections against the order. To put it in other words the detaining authority has made its decisions and passed its order. The detained person is then given an opportunity to urge his objections which in cases of preventive detention comes always at a late stage. The grounds may have been considered sufficient by the Government to pass its judgment. But to enable the detained person to make his representation against the order further details may be furnished to him. In our opinion this appears to be the true measure of the procedural rights of the detained person under Art. 22 (5)."

Thus though not specifically so stated in Art. 22 (5) the grounds furnished must be accompanied or followed by a disclosure of sufficient particulars or facts to enable an effective representation. The entire evidence

47. *State of Bombay v. Atma Ram*, 1951 S.C.R. 167; 6 D.L.R. 216 (S.C.).

48. *State of Bombay v. Atma Ram*, 1951 S.C.R. 167.

or the source of information with the detaining authority need not be disclosed. However, the source of information or the evidence need not be furnished to the detenu. Any mistake which does not prejudice the detenu is of no moment where he is supplied only with a free copy of the actual order.⁴⁹ But "all grounds" and sufficient "facts" must be disclosed. Thus mere allegation of "subversive propaganda,"⁵⁰ secret or under-ground activity⁵¹ without further details disclosing the nature of such activities is too vague, unless the allegations are supported by "facts" which would make them come under one or the other of the listed categories, e.g., security of the State, public order, etc. The sole test for "sufficiency of the grounds" is if it enables an effective representation as is required under Art. 22 (5).⁵² Three factors may be listed in respect of furnishing of grounds as very important:

1. The information containing the grounds with particulars must be sufficient to enable an effective and intelligent representation.

2. The obligation to furnish grounds by the detaining authority is inextricably connected with the right extended to the detenu to have an earliest opportunity to make representation. The test for the former is if the grounds are sufficient to satisfy the detaining authority to make the order of detention. The test for the latter is if it is sufficient to enable the detained person to make the representation at the earliest opportunity.⁵³

3. The duty to furnish the grounds is coupled with a duty to supply speedily such particulars as would enable an effective representation at the earliest opportunity. The particulars also must be furnished "as soon as may be" just as the grounds.⁵⁴

Vague Grounds.

In *State of Bombay v. Atma Ram*,⁵² what is a vague ground has been elaborated thus: "'Vague' can be considered as the antonym of 'definite'. If the ground which is applied is incapable of being understood or defined with sufficient certainty, it can be called vague. It is not possible to state affirmatively more on the question what is vague. It must vary according to the circumstances of each case. It is, however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. This is a matter of detail which has to be examined in the light of the circumstances of each case. If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention, it cannot be called vague. The only argument which could be urged is that the language used in specifying the ground is so general that it does not permit the detained person to legitimately meet the charge against him because the only answer which he can make is to say that he did not act as generally suggested. In certain cases that argument may support the contention that having regard to the general language used in the ground he has not been given the earliest opportunity

49. *Ex parte Greene*, L.R. (1942) 1 K.B. 1387.

50. *In re Krishnaji*, A.I.R. 1948 Bom. 360.

51. *Nek Mohammad v. Emp.*, A.I.R. 1949 Pat. 1.

52. *State of Bombay v. Atma Ram*,

1951 S.C.R. 167; (1951) S.C.J. 208; 6 D.L.R. 216 (Kania, C.J.).

53. *Ramsingh v. State of Delhi*, (1951) S.C.R. 451; 6 D.L.R. 245 (S.C.).

54. *Ujar Singh v. State of Punjab*, (1952) S.C.J. 521.

to make a representation against the order of detention. It cannot be disputed that the representation mentioned in the second part of Art. 22 (5) must be one which on being considered may give relief to the detained person."

In short a "vague" ground is one which is not sufficient to enable the detained person to make an effective representation.⁵⁵ An "irrelevant ground" on the other hand is a ground which has no possible connection at all with the satisfaction of the authority, which can be interfered with by a court. But the sufficiency of grounds which leads to the subjective satisfaction of the detaining authority cannot be gone into by the court except to the extent whether it affords all the materials for an effective representation by the detenu at the earliest opportunity. The grounds though not sufficient for making a representation may yet be quite sufficient for the subjective satisfaction of the authority. The latter satisfaction is subjective while in the former (for representation) it is objective.⁵⁵

The following have been held to be sufficient for helping the detenu in making effective representation:—

1. Where the grounds furnished to the detenu stated that he threatened public peace and tranquillity in a certain district by urging violent methods especially among the labour classes and that his speeches at public meetings and demonstrations were prejudicial to the maintenance of public order in that district.⁵⁶

2. In the grounds communicated, it is not necessary to quote *in extenso* the "objectionable" passages.⁵⁷

3. In a case where the grounds stated that the petitioner was a member of the Communist Party of India wedded to the spreading of the doctrine of violence to acquire power and that though since 1950 the party was divided into two groups by changing the draft programme, the alleged change was a mere camouflage. The party was nevertheless carrying on loot in some districts. It was held the grounds were not vague for mere omission to mention to which of the groups the petitioner belonged.⁵⁸

4. Where the grounds were to the following effect: "That you have been assisting the operations of the Communist Party of India . . . which has for its objects commission of rioting with deadly weapons . . . thus acting in a manner prejudicial to the maintenance of public order . . . ; that as a member of the C. P. I. you have fomented trouble amongst the peasants of the Howrah District and amongst the tramway-men and other workers at Calcutta" and further the instances of meetings and processions with dates were furnished indicating clearly the fomenting of trouble among workers.

It was held⁵⁹ that the grounds were sufficiently clear.

5. Where the allegation is "on 5th October . . . you hoarded maunds of paddy . . . with intent to sell in black market. . . ." ⁶⁰

55. *Tarapada v. State of West Bengal*, (1951) S.C.J. 233.

56. *Benoy v. Government of Assam*, A.I.R. 1950 Assam 49.

57. See also *Ramsingh v. State of Delhi*, (1951) S.C.J. 374: 6 D. L.R. 245 (S.C.).

58. *Sheobachan v. State of Bihar*, A.I.R. 1952 Pat. 177.

59. *Tarapada v. State of W. Bengal*, (1951) S.C.J. 233.

60. *Narasimhamurthy v. The State*, (1951) 6 D.L.R. 53 (Cuttack).

6. Where the grounds furnished to the detenu contain fairly detailed⁶⁰ references to his activities and the detenu had absolutely no doubt or misgiving in his mind regarding them they cannot be held to be vague merely because the dates of the activities imputed are not given.⁶¹

7. If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation and where the detenu after such intelligent understanding procured the certificates to contradict its statements the ground cannot be said to be vague.⁶²

But grounds making wide and sweeping allegations against detenu without disclosing the basis of these allegations are not sufficient.⁶³

8. The fact that the date, time and place of all the particulars are not given in the grounds do not render the order vague when sufficient particulars are given to enable effective representation. Even if one or two grounds are vague that would not affect the validity of order if some of the grounds are clear, definite and precise. Even a charge sheet in a criminal case need not narrate all the materials on the record of a court.⁶⁴

The following have been held to be instances of "vague" grounds:—

1. "You tried to create public disorder amongst the tenants in Una Tahsil by circulating and distributing objectionable literature issued by underground Communists."⁶⁵

2. "That you along with your associates have been collecting and are likely to collect arms and ammunition illegally for illegal purposes and illegal activities" were held to be vague as they did not give requisite particulars regarding the time, place, purposes or activities for which the arms were collected.⁶⁶

3. "In pursuance of the policy of the Communist Party, you are engaged in preparing the masses for violent revolutionary campaign and attend secret party meetings to give effect to this programme."⁶⁷

4. Mere allegations that the applicant's "local reputation" is so bad that he is known as smuggler and profiteer.⁶⁸

5. To state that the detenu was of "a desperate character" and his political creed was said to be Communism.⁶⁹

6. To allege smuggling of cloth and other supplies essential to the community without any details as to date and the like.⁷⁰

61. *Haquittulla Khan v. The State*, A.I.R. 1951 Raj. 69.

62. *Santhamma v. State of Hyderabad*, A.I.R. 1951 Hyd. 128.

63. See also *Bompalli Sathia v. Government of Hyderabad*, A.I.R. 1951 Hyd. 162. *Safatullah Khan v. Chief Secretary, W. Bengal Government*, A.I.R. 1951 Cal. 194.

64. *S. S. Yussuf v. Rex*, A.I.R. 1950 All. 69.

65. *Ujagar Singh v. State of Pun-*

jab, (1952) S.C.J. 521.

66. *Sushila v. Commissioner of Police*, (1951) 5 D.L.R. 242 Bom.

67. *Tarapada v. State of West Bengal*, (1951) S.C.J. 233.

68. *Ramanlal v. Commissioner of Police*, A.I.R. 1952 Cal. 26 (29).

69. *Ananta v. State*, A.I.R. 1951 Orissa 27.

70. *Baktawar v. State*, A.I.R. 1951 Simla 157.

7. Where the grounds merely alleged that the petitioner was a member of the Communist Party and was likely to go underground to further the plans of the Communist Party such as, "sabotage and violence". *Held* the grounds were vague as it did not state when, where and with whom was the plot hatched.⁷¹

8. That the detenu attended a secret meeting on a certain date for chalking out a programme for breach of peace at A's house is vague or that the detenu attended a meeting of the Communist Party on a particular date in the office of the party,⁷² or that the detenu helped . . . on a certain date to go underground,⁷² are all vague. That the detenu, a professor, organized a strike and demonstration in the university or that he attended a meeting in defiance of order passed under S. 144, Cr. P. Code, are not sufficient ground (though not vague).⁷²

9. That the detenu excited the labourers regarding bonus, etc., by false propaganda is vague⁷³ as bonus, etc., and false propaganda are not detailed.

10. That the petitioner was connected with the Communist Party, the aim and object of which is to overthrow the present order by forcible methods and mass demonstrations are vague as it did not connect the petitioners with any overt act⁷⁴ or that the detenu was acting in a manner prejudicial to public safety and the maintenance of public order are also vague.⁷⁴

11. That the detenu has been attempting to disturb the peace and tranquillity in industrial areas by preaching communalism and provincialism and setting non-Bengalis and also trying to lure Muslim labourers to Pakistan for employment are all vague and sweeping as nothing is said of what, where, when and to whom the detenu preached.⁷⁵

12. That the detenu was a zealous worker of the Rashtriya Swayam Sevak Sangh which had been declared unlawful and persisted in activities prejudicial to the public safety and maintenance of public order and communal harmony are vague generalisations as no specific acts of the detenu which constitute the grounds of the order are given.⁷⁶

13. That the detenu would incite 'ignorant people' is vague. What is meant by 'ignorant' is itself not precise and how the detenu has attempted to incite is not given.⁷⁷

14. "That you being a member of the R.S.S., an unlawful association, are indulging in dangerous subversive activities, spreading alarmist statements and rumours and promoting communal and political friction and that it is most unsafe to allow you to remain at large" are all vague for want of precision as regards the subversive acts indulged in by the detenu.⁷⁸

71. *Kulomoni v. The State*, A.I.R. 1950 Orissa 20.

72. *Asha Ram v. State*, A.I.R. 1950 All. 709.

73. *Shiv Prasad Ram Narayan Joshi v. State*, A.I.R. 1950 M.B. 118.

74. *Labaram v. The State*, A.I.R. 1951 Assam 43.

75. *Saftullah Khan v. Chief Secretary*, A.I.R. 1951 Cal. 194.

76. *Shiv Prasad v. State*, A.I.R. 1950 M.B. 118.

77. *In re Bhaurao Karbhari Awara*, A.I.R. 1950 Bom. 126.

78. *Inderprakash v. Emperor*, A.I.R. 1949 All. 36.

15. Where it was alleged that the detenu instigated the sweepers' strike but the place or time of instigation are not mentioned—the ground was vague and indefinite.⁷⁹

16. Where the allegation was that the detenu had been inciting workers to commit acts of violence and thereby acting in a manner "prejudicial to public safety and tranquillity of Greater Bombay" without particularising the class of workers and mentioning the time during which the detenu was supposed to have incited them held to be too vague.⁸⁰

17. Where the grounds stated that the detenu during the last few days had been responsible for the communal disturbances in Cawnpore city and for attempting to bring law and order into contempt and had introduced conditions in which breaches of peace could not be avoided.⁸¹

Insufficient Grounds.

Insufficiency of grounds is distinct from vagueness.

The following have been held to be "insufficient grounds":—

1. Where the detenu was a practising lawyer and the allegations against him were that he was closely associated with the revolted group of the Revolutionary Communist Party, which was committed to the sabotaging of communications and vital installations and to spreading disaffection amongst industrial workers, harassing the police and murdering military and police officers—these were held to be insufficient grounds.⁸²

2. Where the only ground was that the detenu was a member of the Rashtriya Sevak Sangh which had been banned and that he was holding the important post of provincial organizer in the Andhra Branch.⁸³

3. Where the allegation was that the detenu was making objectionable speeches and he was inciting kisans against Government and Zamindars and preaching hatred against the Government and was referring to the proverb 'Jis ki lathi us ki bhains'— these were insufficient.⁸⁴

4. Where the grounds were that the detenu was an active leader of a subversive organization at Amalner, that he had been carrying on subversive propaganda among the people to prepare and use illegal and violent ways and that he was thus acting in a manner prejudicial to the public safety and maintenance of public order the grounds were held to be insufficient and bad in law.⁸⁵

5. A ground that the detenu gave shelter to the dacoits at a period before November, 1949 when he was detained and in this way and also in other ways the detenu had directly or indirectly helped the dacoits in their activities is an insufficient ground.⁸⁶

The following were held to be beyond the law allowing preventive detention:—

79. *Rambilas Gupta v. Rex*, 1949 All. 748.

80. *In re Anant Mahadev*, A.I.R. 1949 Bom. 95.

81. *Emperor v. Sumer Singh*, A.I.R. 1948 All. 78.

82. *Kanai Lal v. Province of Bihar*, A.I.R. 1946 Pat. 369.

83. *In re Narahari*, A.I.R. 1949 Mad.

438.

84. *S. G. Sardesai v. The Provincial Government*, A.I.R. 1949 All. 395.

85. *In re Krishnaji Gopal*, A.I.R. 1946 Bom. 360.

86. *J. Alaraka v. State*, A.I.R. 1951 Saur. 13.

1. Where the grounds were that the detenu was a habitual criminal, convicted and suspected of committing thefts in running goods trains and allowed to remain at large he would again indulge in thefts in railways, the grounds were held to be beyond the scope of law allowing preventive detention.⁸⁷

2. Where the grounds were "that you during the last few days have been responsible for the communal disturbances in Cawnpore city and for attempting to bring law and order into contempt and have introduced conditions in which breaches of peace cannot be avoided"—this was not sufficient compliance with the law of preventive detention.⁸⁸

3. The grounds must be relevant to the circumstances under which preventive detention could be supported in law *e.g.*, security of India, maintenance of public order, etc.⁸⁹ Mere breach of the peace cannot be a ground since it is necessarily offending public order. The former is private in character while the latter connotes public concern.

The following may be listed as possible grounds of attack against an order of detention:—

1. The order is not by a competent authority.

2. There is a mistake in the identity of the person ordered to be detained.

3. There is a lack of *bona fide* on the part of the detaining authority so as to suggest that it did not apply its mind regarding the necessity for the detention.⁹⁰

4. There is no reason disclosed in the order of detention so as to justify detention.⁹¹

5. Where the object of the order is the prevention of a person being released on bail.⁹²

6. Where the grounds are vague, indefinite and not clear or precise.⁹³

7. The grounds are far-fetched and have no real and proximate connection or relevancy with the necessity for detention.⁹⁴

8. The person against whom an order of detention is passed is already in jail awaiting trial in respect of certain offences.⁹⁵

9. The grounds of detention are merely to enable investigation of crime.⁹⁶

10. The absence of any conceivable connection between the grounds of the detention order with the maintenance of public order for which detention is ostensibly ordered.⁹⁷

87. *Lalu Gope v. The King*, A.I.R. 1949 Pat. 299.

88. *Emperor v. Sumer Singh*, A.I.R. 1948 All. 78.

89. *Gopalan v. State of Madras*, 1950 S.C.R. 88: 6 D.L.R. 313 (S.C.).

90. *Narayanawami Naidu v. Inspector of Police, Mayavaram*, I.L.R. 1949 Madras 377: A.I.R. 1949 Mad. 307.

91. *A.K. Gopalan v. District Magistrate, Malabar*, 62 L.W. 103.

92. In the matter of *M. R. Srinivasan*, A.I.R. 1949 Mad. 761: (1949) 1 M.L.J. 581.

93. In re *Krishnaji*, A.I.R. 1949 Bom. 360.

94. *Rex v. Basudev*, 1950 S.C.J. 47.

95. *Narayanamma v. Hyderabad State*, A.I.R. 1950 Hyd. 68.

96. *Mohammad Abdur Rahiman v. Hyderabad State*, A.I.R. 1950 Hyd. 66.

97. *Asaram v. State*, 1950 All. 709.

Result of Supplying vague Grounds.

When the detaining authority does not take sufficient care in furnishing the detenu with clear grounds so as to afford him all facility to make a representation at the "earliest opportunity", at once Art. 22 (5) gets infringed and renders the detention order *ab initio* void.⁹⁸ The Supreme Court took the view⁹⁹ that vague and insufficient grounds entitled the detenu to be set at liberty as there was a breach of the constitutional guarantee. There were some cases¹ where though the grounds were found to be rather sketchy, yet as the subsequent affidavit, furnished in a proceeding under Art. 226 a copy of which was given to the detenu, contained all the required particulars, the detenu was enabled to make the representation. It was held that under those circumstances the order of detention could be sustained. But this view was controverted in a *Punjab case*,² where it was held, the subsequent affidavit did not in any event cure the initial invalidity of the detention order. This was reaffirmed by the Supreme Court in appeal in *Atma Ram's case*³ where it reiterated the general principle that the constitutional guarantee for easy and early opportunity to make the representation by enjoining the furnishing of clear grounds *ab initio* and any subsequent clarification would not cure the initial invalidity. The grounds therefore must not be initially vague and except curing it for technical defects, it cannot be later perfected by additional particulars by means of a fuller affidavit.

But if despite some defect in the grounds the detenu did make a detailed representation to the Advisory Board, he cannot afterwards complain to the court that the grounds were so vague as to make the representation impossible.⁴ If the grounds were well known to the detenu and he was not prejudiced on account of any defect in the "grounds" he cannot claim release merely on account of such defects.⁵ As stated earlier, sufficiency of grounds is not a matter for the court except to the extent to see if it affords facility to make due representation at the earliest opportunity. Sufficiency is otherwise left to the subjective satisfaction of the detaining authority.

Supplying of "Grounds" by Instalments.

This has been held to be very reprehensible.⁶ As already adverted to, "vague grounds cannot be subsequently amplified or improved." But there is nothing to prevent subsequent communication of particulars of facts relating to the grounds already supplied. Only the provision as to sufficiency of grounds for enabling an early representation should not be defeated. In *Atma Ram's case*³ it was pointed out: 'It is clear that if by 'supplementary grounds' is meant additional grounds, i.e., conclusions of facts required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to the infringement of the first-mentioned right in Art. 22 (5) as the grounds for the order of deten-

98. *State of Bombay v. Atma Ram*, 1951 S.C.R. 167; *Safatulla v. Chief Secy.*, (1950) 55 C.W.N. 27; *Kulmoni v. The State*, A.I.R. 1951 Or. 20; *Ananta v. The State*, A.I.R. 1951 Or. 27; *Baktawar v. The State*, A.I.R. 1951 Simla 157.
99. *Mehar Singh v. The State*, Ori. Petn. No. 60/50; *Sohan Singh v. The State*, (Ori. Petn. 110/50).
1. *Makkam Singh v. State of Punjab*, Ori. Petn. 54/50 (S.C.);

Joga Singh v. State of Punjab, Ori. Petn. 62/50 (S.C.).
2. *Ibid.*
3. (1951) S.C.J. 208.
4. *Ramanathan v. State of Hyderabad*, A.I.R. 1952 Hy. 186.
5. *Ram Adhar v. State*, A.I.R. 1951 All. 18.
6. *Benoy v. Govt. of Assam*, 1950 Assam 49; *Ram Singh v. State of Delhi*, (1951) S.C.J. 374.

tion must be before it is satisfied about the necessity for making the order and all such grounds have to be furnished as soon as may be." The other aspect, viz., the second communication (described as supplemental grounds) being only particulars of the facts mentioned or indicated in the grounds firstly supplied, or being additional incidents with same conclusion of the fact (which is the ground furnished in the first instance) stand on a different footing. These are not new grounds within the meaning of the first part of Art. 22 (5). Thus while the first-mentioned type of "additional" grounds cannot be given after the grounds are furnished as soon as may be but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of rights mentioned in Art. 22 (5).

It must be noted there is a constitutional duty to furnish the initial grounds. But there is no compelling provision, contemplating a second communication from the detained authority. In many cases there may be no second communication at all. There may even be two or more subsequent communications but they can give only further particulars for the old ground and cannot strike new grounds. They cannot also erase the constitutional duty on the detaining authority to furnish "as soon as may be" ground sufficient to make a representation. The following examples are furnished in elucidation of this:—

(1) In *Atma Ram's case*⁷ the first grounds of detention dated 29th April 1950 stated: "that you are engaged and are likely to be engaged in promoting acts of sabotage on railway and railways in Greater Bombay." This was attacked as vague in the detenu's *habeas corpus* application. During the pendency of this application the Commissioner of Police on 26th August 1950 sent further particulars in a communication to the effect "that the activities mentioned in the grounds furnished to you were being carried on in Greater Bombay between January, 1950 and the date of your detention and in all probability you will continue to do so." This was held to be no new ground but mere particulars of the old ground which by itself was not so vague as to disable effective representation at the earliest opportunity.

(2) In *Tarapada v. State of West Bengal*⁸ also the grounds were served on 14th March 1950 to the effect—

(a) "That you have been assisting the operations of the Communist Party of India which along with its volunteer organizations had been declared unlawful by Government under Sec. 16 of the Indian Criminal Law Amendment Act XIV of 1908 and which has for its object commission of rioting with deadly weapons, robbery, dacoity, arson and murder and possession and use of arms and ammunitions and explosives and thus acting in a manner prejudicial to the maintenance of public order and that it is necessary to prevent you from acting in such manner.

(b) "that as a member of the C.P.I. on its Kishan front you have fomented trouble amongst the peasants of Howrah District and incited them to acts of lawlessness and violence and have thereby acted in a manner prejudicial to the maintenance of the public order. . . ."

7. (1951) S.C.J. 208.

8. (1951) S.C.J. 233.

On 16th July 1950 the Government served on the appellants in continuation of the grounds already furnished supplementary grounds running as follows:

"You as Secretary of Bengal Chatilal Mazdoor Union, as member of the Executive Committee of the Federation of Mercantile Employees Union, as the honorary reporter of the Khabar newspaper (C.P.I. organ) carried on the disruptive programme of the C.P.I. On 29th July 1948 you along with others led a procession at Howrah preaching discontent against Government and have been thus acting in a manner prejudicial to the maintenance of public order."

It was held the supplementary grounds supplied on 16th July were not "new grounds" but only furnished details of the second head of the ground furnished on 14th March. The fact that the details were communicated later does necessarily show that they were not within the knowledge of the authorities when they sent the first communication of grounds. The burden of proving bad faith is on the detenu.

Result if one of several grounds is vague or irrelevant.

As already stated, a "vague" ground implies insufficiency of materials in the grounds disabling the detenu thereby from making an effective representation. "Irrelevant" means "not relevant", i.e. a ground which has no connection whatsoever with the satisfaction of the authority. So even if one of the grounds is irrelevant, the detention would be invalid, though the other grounds might be quite relevant. The reason is it can never be ascertained at what extent the bad or irrelevant reasons operated on the authority to make the order. Further it cannot be predicted if the detention order would have been made at all if only one of two good reasons had been before them.⁹ One cannot be certain which ground decided the authority to issue the order. To determine if a particular ground is irrelevant the grounds must be read as a whole.¹⁰ In the instant case it was argued that the following ground of detention was not at all relevant as it had no connection with "security of the State or maintenance of public order." The impugned ground was to the effect "Being the President of Agris you have used your position as such to increase your influence over the residents of Uranpeta, have created a band of obedient and trusted associates, have inflicted heavy fines on villagers in Uranpeta who have disregarded your wishes and have imposed on them boycott or excommunication in cases of their refusal to pay the fines". The argument that this ground was nothing more than the exercise of the usual powers of the head of a caste was negatived and the Supreme Court observed, "In our opinion the grounds of detention must be read as whole and when that is done the relevancy of the first ground becomes plain. The gravamen of the charge against the petitioner is that he aimed at setting up a parallel Government in the Uranpeta area and in order to achieve that end he did various acts such as intimidating the workers in the salt pans with threats of murder and his own workers with threats of death unless they carried out his orders and among the lesser instances given to illustrate the exercise of parallel Governmental authority are the infliction of fines with the sanction of excommunication and boycott to ensure their payment and due obedience to his orders".

9. *Keshav Talapade v. Emperor*, A.I.R. 1934 F.C. 1; *Gurbux v. State*, A.I.R. 1952 Pepsu 12.

10. *Sham Rao v. D. M. Thana*, (1952) S.C.R. 683; A.I.R. 1952 S.C. 324; 7 D.L.R. 380 (S.C.).

If instead of one of the grounds being irrelevant it is vague, then the order of detention is not necessarily rendered void on that account as the order is but the result of the cumulative effect of all the grounds mentioned.¹¹ Only when one of the grounds is irrelevant, different considerations arise as set out in the previous paragraph.

If the grounds are irrelevant to the object, i.e. preventive detention, the detenu is entitled to move the court under Art. 32 for vacating the order of detention and place before it how Art. 22 (5) had not been observed in the furnishing of grounds.

For this the detenu must be enabled to place the piece of paper—'grounds' furnished to him before the court—to enable the court to determine whether there has been any violation of Art. 22 (5). Therefore any law which prevents the detenu from disclosing to the court the 'Grounds' communicated to him under Art. 22 (5) prevents the court itself from obtaining such information and so is certainly *ultra vires*. This was the view held in *Gopalan v. State of Madras*,¹² where, as already detailed, Sec. 14 of the Preventive Detention Act, 1950, was declared void. Sastri, J., however, opined¹³ that though it would not be open to the court to examine the sufficiency of the grounds on which the executive authority was satisfied yet it would nevertheless be open to the detenu to show that his detention was not *bona fide*.

The Supreme Court has held in *Ramakrishan v. State of Delhi*^{13a} that the petitioner has the right under Art. 22 (5) to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him. This constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under cl. (6) of Art. 22. Where it has not been done in regard to one of the grounds mentioned in the statement of grounds (it being vague), the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 and he is therefore entitled to be released. Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the proper exercise of the power must be jealously watched and enforced by the court. In view of this authoritative opinion of the Supreme Court as to the effect of a vague ground the decisions of High Courts,^{13b} to the contrary have no binding value. The Supreme Court in fact said in the instant case,^{13a} "On this question there is no considered pronouncement by this court though in some cases it would appear to have been assumed in the absence of any argument that one or two vague grounds could not affect the validity of the detention where there are other sufficiently clear and definite grounds to support the detention." The reasoning is that in a given case it is possible for the detenu to rebut to the satisfaction of the Advisory Board the clear grounds while he may not be able to carry any conviction as against a 'vague ground', for want of particulars enabling him to present his case well.

11. *Ramanlal v. Commr. of Police*, A.I.R. 1952 Cal. 27; *Roshanlal v. State*, A.I.R. 1951 Pepsu 164.

12. 1950 S.C.J. 174 (197).

13. *Ibid.*, p. 245.

13a. A.I.R. 1953 S.C. 318.

13b. *Ramanlal v. Commr. of Police*,

A.I.R. 1952 Cal. 27; *Roshanlal v. State*, A.I.R. 1951 Pepsu 164; *Jangir Singh v. State*, A.I.R. 1953 Pepsu 190; *Gurbaksha Singh v. State*, A.I.R. 1952 Pepsu 126.

The Supreme Court in the instant case,^{13a} further held that "a layman who is not experienced in the interpretation of documents can hardly be expected without legal aid which is denied to him, to interpret the grounds in the proper sense." It is, therefore, up to the detaining authority to make its meaning clear beyond doubt without leaving the person detained to his own resource for interpreting them. Otherwise such grounds would be regarded as vague so as to render it difficult, if not impossible, for the petitioner to make an adequate representation.

This decision of the Supreme Court^{13a} was followed in a Pepsu case, *Bakhtawar Singh Bishal Singh v. State of Pepsu*,^{13c} to the effect "All the grounds supplied to the petitioner must be clear and specific and even if one of them does not satisfy this condition the right of representation guaranteed to the detenu under Art. 22 (5) is affected and consequently the order of detention is illegal." It is noteworthy that the Pepsu High Court held a contrary view,^{13d} prior to the Supreme Court decision.

In *Chaudhri Rambhaj v. Punjab State*,^{13e} it has been pointed that where the first sentence of the grounds mentioned merely the detenu's association with a gang wanted in fifteen cases of murder and in the next sentences are given three specific acts of such association and assistance, the grounds are clear enough though the first sentence might be a little vague. It has been also held that preventive action is not necessarily illegal simply because a prosecution for the offence itself could have been launched. In fact where the detenu is all powerful and would tamper with witnesses, the only action is preventive and not punitive. The observations of the Supreme Court in *Ashutosh Lahiri v. State of Delhi*,⁸¹ to the effect that "there could be no better proof of *mala fides* on the part of the executive authorities than a use of the extraordinary provisions contained in the Act for purposes for which ordinary law is quite sufficient" cannot apply to the facts of the instant case. For where the detenu is all powerful so as to defeat a regular prosecution, the only proper course is to invoke the detention law.

Period of Detention.

In *M. M. Bashir v. State*,¹⁴ it was posited that an order of detention without fixing the period of detention is not capable of being properly carried out by the authority to whom the order is directed and hence the order will not be one in accordance with law. Sec. 12 of the Detention Act lays down the maximum period but it does not lay down that in case the detaining authority prescribes no period the detention will continue for the whole of the maximum period. But this view was dissented in *Chandra Shekar v. State of Bihar*,¹⁵ in holding that an order under Sec. 3 of the 1950 Act is not invalid by reason of failure to mention therein the period of detention as the law did not stipulate that the period should be mentioned in the order. In *Jaya Singh v. State*,¹⁶ it was conceded that the specification of the period of detention is one indispensable essential that would go to make the order of detention legal and valid in the eye of law. The maximum period allowed under the law cannot be presumed. Non-mention of the period makes the order vague and Sec. 13 of the 1950 Act cannot be resorted to to get over

13c. A.I.R. 1953 Pepsu 207.

13d. Vide *Rashanlal v. State*, A.I.R.

1951 Pepsu 164.

13e. A.I.R. 1954 Punjab 154.

13f. A.I.R. 1953 S.C. 451.

14. A.I.R. 1951 All. 357.

15. A.I.R. 1951 Pat. 319.

16. A.I.R. 1951 Pepsu 1.

this defect by the Government modifying or revoking the order and passing a fresh order. In *A. K. Gopalan v. State of Madras*,¹⁷ the Supreme Court finally set the matter at rest by stating, "It was also contended that Sec. 3 (of the 1950 Act) prescribes no limit of time for detention and therefore the legislation is *ultra vires*." The answer is found in Art. 22 (7) (b). A perusal of the provisions of the impugned act moreover shows that in Sec. 12 provision is made for detention for a period longer than three months but not exceeding one year in respect of Cl. (1) and (b) of that section. "It appears therefore that in respect of the clauses mentioned in Sec. 5 (1) (a) of the Detention Act it is not contemplated to be for a period longer than three months and in such cases a reference to the Board under Sec. 9 is contemplated. . . . The whole life of the Preventive Detention Act is for a year and therefore the argument that the detention may be for an indefinite period is unsound. Again by virtue of Art. 22 (7) (b) Parliament is not obliged to fix the maximum term of such detention."¹⁷

Parliament has not so fixed it except under S. 12 and therefore it cannot be stated that S. 11 is in contravention of Art. 22 (7). In *Mekhan Singh v. State*,¹⁸ the Supreme Court again held that fixing a period of detention in the initial order was contrary to the scheme of the Act. The Government should determine what the period of detention should be only after the Advisory Board had sent its reports. In *Ramsingh v. State of Delhi*,¹⁹ the Supreme Court stated that even if the order of detention under Sec. 3 of the 1950 Act did not specify the period during which the detenus were to be under detention the order is not invalid as Sec. 12 prescribes the maximum period of one year. In *Ujagar Singh v. State of Punjab*,²⁰ the Supreme Court made it clear that Sec. 12 of the Act did not require that the period of detention should be specified in the order itself where the detention was with a view to preventing any person from acting in a manner prejudicial to the maintenance of public order. The section itself provides he can be detained without the Advisory Board's opinion for a period longer than three months but not exceeding one year from the order of detention. So we may conclude that the initial order of detention need not contain the period of detention. Only after the Advisory Board's report is the period to be determined and the maximum period is fixed in Secs. 11 and 12 of the Preventive Detention Act, 1950, read with Art. 22 (7).

Judicial Interpretation

Ujagar Singh's case.—The Supreme Court in *Ujagar Singh v. State of Punjab*²¹ laid down the following propositions:

1. If the authority had to supply grounds to a very large number of detenus (say 250) at one and the same time, it will not be unreasonable if there is a delay of one month and it cannot be said that the clause "as soon as may be" has been infringed. What is reasonable delay is a question depending on the facts of each case.

2. Detention on grounds of past activities is not necessarily to be construed as *mala fide*. A fresh order of detention on the same grounds after the expiry of the prior order under a temporary Act is quite *intra vires*

17. (1950) S.C.R. 88: 6 D.L.R. 313.

18. 1952 S.C.R. 368: 1951 S.C.J. 835.

19. 1951 S.C. 270: 1951 S.C.J. 374.

20. *Vide* notes under Art. 22 (7),

A.I.R. S.C. 350.

21. A.I.R. 1952 S.C. 350: 1951 S.C.J. 208: 7 D.L.R. 416 (S.C.),

if the authority is satisfied that it is necessary and feels that the old grounds do still exist. The past conduct or antecedent history of a person can be taken into account when making a detention order and as a matter of fact. It is largely from prior events showing the tendencies or inclinations of the man that an inference could be drawn whether he is likely even in the future to act in manner prejudicial to the maintenance of public order.

3. The grounds once furnished cannot be supplemented by new grounds. But further particulars of the original grounds may be given. Thus while the first ground was "you tried to create disorder amongst tenants in Una Tehsil by circulating and distributing objectionable literature issued by the underground communists. . . ." was vague, the supplementary ground was "you are responsible for hartal by labourers working on Bakra Dam . . . you instigated labourers working in Nangal in 1948 to go on strike"—the latter ground is definitely new and has no relation to the original ground and so has to be eliminated from consideration while determining the validity of the detention order.

4. But if the subsequent communication is only of particulars of the old grounds, the particulars should be taken into consideration in determining whether the detenu has been furnished with sufficient information to enable him to make a representation "as soon as may be". But if there is an inordinate delay of four months in supplying the particulars, after the order of detention, it is a clear case of denial of earliest opportunity to the detenu to make the representation as contemplated under Art. 22 (5).

5. While the period of detention under Art. 22 (4) is not to exceed three months except as laid down in Art. 22 (7), the period can be extended by the opinion of the Advisory Board or by legislative provision. Thus Sec. 12 of the Preventive Detention Act provides that detention can be had without the opinion of an Advisory Board for a period not exceeding one year from the order of detention. In such circumstances in the instant case the non-specification of any definite period in the detention order is not a material omission rendering the order itself invalid.

6. The communication of the grounds need not be made directly by the authority making the order. Sec. 7 of the Preventive Detention Act does not require this. The communication may be through recognized channels prescribed by the administrative rules of business.

7. A ground such as "In pursuance of the policy of the Communist party you are engaged in preparing the masses for violent revolutionary campaign and attended secret party meetings to give effect to this programme" is certainly vague.

In *Ramsingh v. State of Delhi*,²² the Supreme Court held:

1. It was sufficient to communicate to the detenu the time and place of the speeches and their general nature and effect and it was not necessary to quote the passages or substance in order to comply with Art. 22 (5). Per Mahajan, J., the sufficiency of the material supplied is a justiciable issue though the sufficiency of the grounds on which the detaining authority made up its mind is not a justiciable issue.

22. (1951) S.C.R. 451: (1951) S.C. J. 374: (1951) 6 D.L.R. 245:

A.I.R. 1951 S.C. 270.

2. The scope of Arts. 19 and 22 is entirely different. Art. 19 can have no application when Art. 22 is applied. In the instant case it was held that a man could be detained for his speeches in the interest of "public order" which ground was not available in Art. 19 as it originally stood. Art. 19 has, however, been amended now to include "public order". If the legislation is for punitive or preventive detention, the direct article to apply is Art. 22 and Art. 19 cannot be invoked at all in such circumstances.

In *Atma Ram's case*²³ the detenu was extended the right to be furnished with sufficient information to enable an effective representation and the court rightly deplored "the deliberate" attempt to use the minimum number of words in the communication conveying the grounds of detention. But the majority decision in *Ram Singh's case* appeared to be a retrograde step as it shows that the court is slow to interfere on the scope of insufficiency of particulars supplied to the detenu. The minority judgment expressed by Mahajan and Bose, JJ., clearly posited that unless the offending passages or their substance were communicated it was not possible for the detenu to make any statement except a bare denial. This bare denial could be never convincing and so would be a mere "idle formality". The reality in Art. 22 (5) consists in sufficiency of grounds and an effective representation as soon as may be. The former should enable the latter and any whittling down of this standard will contravene Art. 22 (5).

In *Bhimsen v. State of Punjab*,²⁴ the Supreme Court has posited that the subjective satisfaction of the detaining authority in making the initial order is not taken away by the Amending Act IV of 1951 which established a supervisory authority in the shape of an Advisory Board. Though the object of detention is to prevent a person from acting in future in an objectionable way, the court cannot hold that the order of detention is *mala fide* simply because it refers to past activities. For the entire matter is only to the subjective satisfaction of the detaining authority and is not at all justiciable. Past activities may show a definite continuing trend of detenu's mind, and so unless *mala fides* is made out the order cannot be quashed on the ground of reference to past activities. Sufficiency of the grounds for the detaining authority to make the order or the truth of the statements is beyond the jurisdiction of the court.²⁵

In an old *Bombay case*,²⁶ it was stated that it was open to a detenu to show in court that particulars furnished were so incorrect as to indicate that the authority did not apply its mind at all in making the order of detention. But in the instant *Bhimsen's case*, the Supreme Court negated this proposition and held that the detenu could not be heard at all on this point and whatever he wanted to say on the point of incorrectness of the recitals was only a matter for representation to the Advisory Board. The decisions in *Pyarelal v. State*,²⁷ and *Ananta v. State*,²⁸ gain support from the Supreme Court's decision in *Bhimsen's case*. But it may be added the review by the Board on the correctness of particulars is not the same as a review by court. The former is private and never made public. If the review was by court, at

23. A.I.R. 1951 S.C. 157; (1951) S.C.J. 208; 6 D.L.R. 216 (S.C.).

24. (1952) 7 D.L.R. 78 (S.C.); A.I.R. 1951 S.C. 481; 1951 S.C.J. 747.

25. Vide also *Santhamma v. State of Hyderabad*, A.I.R. 1951 Hyd. 128; *M. R. S. Mani v. District*

Magistrate, A.I.R. 1950 Mad. 162; *Ananta v. State of Bihar*, A.I.R. 1952 Orissa 27; *Suboda v. State*, 1951 Pat. 68.

26. In re *Shoilen Dey*, A.I.R. 1949 Bom. 75.

27. A.I.R. 1952 All. 180.

28. A.I.R. 1951 Orissa 27.

any rate in a matter of grossly incorrect particulars, *mala fides* and absence of basis for the order could be more easily substantiated by the detenu.

In *Dr. Ram Krishna Bharadwaj v. State of Delhi*,²⁹ the Supreme Court opined, "The layman who is not experienced in the interpretation of documents can hardly be expected without legal aid which is denied to him, to interpret the grounds in the proper sense. It is therefore up to the detaining authority to make his meaning clear beyond doubt, without leaving the person detained to his own resources for interpreting them." Otherwise the grounds would be regarded as vague so as to render it difficult, if not impossible for the petitioner to make an adequate representation. It was further held that the constitutional guarantee of sufficiency of grounds to enable an effective representation must be satisfied with respect to each of the grounds; even if one of the grounds was not thus satisfied the detention could be held to be in accordance with procedure established by law per Art. 21.

In *Gehel Umed Singh Narubha v. State*,³⁰ it was held that a person could not be detained for a day longer than three months unless upon the report of the Advisory Board which meant upon action taken on such a report and that action must necessarily be taken before the expiration of the three months' period under Art. 22 (4), for else the detention of the person beyond the three months' period would be illegal. It is clear from the language of section 10 (1) of the Act that the provision as to the submission of the Advisory Board's report within ten weeks is imperative and that the Advisory Board has to conform to the time limit therein prescribed. If the report of the Board was not submitted to the Government within ten weeks from the date of the order of detention further detention becomes illegal.

Grounds.

In *Ananda Sankar v. Government of West Bengal*,³¹ it was held that where the supplementary grounds were really particulars of the general grounds given earlier by a month, the expression "as soon as may be" for effective representation was quite fulfilled following *Atma Ram's case*, and *Tarapada De's case*. The detenu was a member of the Communist party. Apart from the question whether the Communist party was declared an illegal organisation it was held that on a fair reading of the grounds it would appear that the detenu was regarded as dangerous not because he was a member of an illegal organization but because he was a member and assisted in the activities of an organization whose objects were said to be a danger and a menace to the maintenance of public order and security of the State.³² Further the court was not entitled to question whether the statements made in the grounds were untrue where certain persons were discharged from prison on a criminal charge and on the wake of it preventive detention action was taken, it could not be said on that account to be *mala fide*. Something more is needed to prove *mala fide*. For such persons with criminal propensities, when they are set at liberty are likely to be a menace to public safety if circumstances warrant it.

In *Sushila v. Commissioner of Police, Greater Bombay*,³³ the underlying principle of Sec. 7 (1) and (2), Preventive Detention Act and Art. 22 (5)

29. A.I.R. 1953 S.C. 318: 1953 S.C.J. 444.

30. A.I.R. 1953 Sau. 51; See also *Dabhi Harisingh Laxmananji v. State*, A.I.R. 1953 Sau. 63.

31. A.I.R. 1953 Cal. 129.

32. *Ibid.* Vide *Amulya Banerjee v.*

State of West Bengal and Tarapada v. State of West Bengal, A.I.R. 1951 S.C. 174: 6 D.L.R. 235 (S.C.).

33. A.I.R. 1951 Bom. 252: I.L.R. (1951) Bom. 92: 5 D.L.R. Bom. 242.

and (6) was explained thus: The court has first to consider whether the ground or grounds disclosed by the detaining authority contain facts or materials sufficient in its opinion to enable the detenu to make a representation. Then it has to consider whether any of the facts which it thinks necessary have been rightly withheld by the detaining authority on the ground that a disclosure of such facts would be against public interest. If no such facts have been withheld on the ground of public interest and they have not been disclosed, then the court must come to the conclusion that the provisions of Sec. 7 (1) and (2) not having been complied with the detention is not valid and the detenu must be set free.

Chagla, C.J., added the dicta, "We should like to make it clear that the exercise of the discretion vested in the detaining authority by sub. cl. (6) may be challenged on the ground that the discretion has been exercised arbitrarily, capriciously or *mala fide*, but if the discretion is properly exercised it is not for the court to sit in judgment on an opinion formed by the detaining authority that certain facts are not in the public interest to disclose."

In *Saftulla Khan v. Chief Secy. of W. B. Government*,³⁴ it was pointed out that there was a clear difference between grounds and facts. The grounds are the basis of the allegation. The facts are the evidence on which the basis of allegations are established. Under Art. 22 (6) the grounds cannot be refused to be disclosed in public interest. It is only the "facts" that can be so refused to be disclosed.

In *Dr. N. B. Khare v. State of Delhi*,³⁵ the grounds disclosed were held sufficient to sustain the order of externment. It was not however a case of preventive detention. The grounds state, "Your activities generally, and particularly since the recent trouble in East and West Bengal have been of a communal nature tending to excite hatred between communities and whereas in the present composition of the population of Delhi and the recent communal disturbances of Delhi, feelings are aroused between majority and minority communities your presence and activities in Delhi are likely to prove prejudicial to the maintenance of law and order, it is considered necessary to order you to leave Delhi." The learned Chief Justice held, "Apart from being vague I think that these grounds are specific and honestly believed, can support the order". It must be remembered that Dr. Khare's case arose under Art. 19 (1) (d) and as per Art. 19, Cl. (5), it was considered that the externment order was not an unreasonable restriction on the freedom of movement. It was, however, decided therein that the grounds of externment must be supplied so as to enable the party to make a representation.

In *Thiruvudinadha v. District Magistrate*,³⁶ it was pointed out that Art. 22 (5) did not merely enable the detenu to take exceptions to the grounds as untenable and illegal but it also gave the right to question the validity of the order of detention to do which also the detenu must be in possession of a copy of the order and a copy of the grounds also. He had a right to move for his liberty even before the grounds are served on him. New service of the order of detention even after request will result in setting the detenu at liberty.

In *Santhamma v. State of Hyderabad*,³⁷ it was pointed out that the phrase "as soon as may be" in Art. 22 (5) does not exclude reasonable

34. A.I.R. 1951 Cal. 194.

35. A.I.R. 1950 S.C. 211: 5 D.L.R. 36 (S.C.).

36. A.I.R. 1951 Trav. Cochin, 130:

6 D.L.R. (T.C.) 85.

37. A.I.R. 1951 Hy. 128: 6 D.L.R. (Hyd.) 71 (F.B.).

time for formulating the grounds on the material in possession of the authority. The correctness of statement of facts including past activities mentioned in the grounds cannot be questioned in a court of law. They can be challenged only in the representation to the Advisory Board. Prejudicial activities in future can be apprehended from past conduct if circumstances warrant it. This again is to be to the subjective satisfaction of the authority and is not left to be justiciable.

In *Mohitlal v. The State*,³⁸ it was pointed out that the expression "the maintenance of public order" is comprehensive enough to include "the security of the State" as used in Sec. 3 of the Preventive Detention Act, 1950. So when the grounds mentioned the former expression and the order of detention mentioned the latter expression, it cannot invalidate the order.

In *Singh Nathawan v. State of Punjab*,³⁹ it was held that in the absence of bad faith the detaining authority could supersede an earlier order of detention which was challenged as defective on formal grounds and passed a fresh order which was devoid of such formal defects. The question of bad faith must be decided with reference to the circumstances of each case. In all *habeas corpus* proceedings the court was to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of proceedings. Section 13 of the Preventive Detention Act also provided that detention order might at any time be revoked or modified and that such revocation should not bar the making of a fresh detention order under Sec. 3 of the Act against the self-same person.

In *re Meghanlal Jivabhai*,⁴⁰ it was pointed out that the purpose of Art. 22 (5) of the Constitution and Section 7 of the Preventive Detention Act clearly was that the grounds furnished to the detenu should be sufficient to enable him to make an effective representation. The scheme of the Act was not merely to import mechanically the language of Cls. (a) and (b) of Sec. 3 (1) of the Preventive Detention Act into the grounds furnished under Section 7 to give all facts. It was further pointed out that liberty of the person was much wider than the freedom of expression. Hence if what was curbed by the order of detention was the freedom of person the detenu could not complain that to the extent published secretly unauthorised objectionable news-sheets, action should have been taken under the Press Emergency Powers Act, 1931 and not under the Preventive Detention Act, 1950.

In *Asharam v. State*,⁴¹ it was stressed that the grounds of detention must be connected with the order of detention. Otherwise it would be an infringement of Art. 22 (1), (2) and (5). For it would be open to a detenu to contend in a court that the grounds on which the order had been passed had no connection at all with the maintenance of public order or had no connection with the circumstances or class of cases under which a preventive detention order could be passed. The Hyderabad High Court had held in the following case (*see footnote*)⁴² that the non-furnishing of grounds at an early opportunity, rendered the detention unlawful and so the detenu could be set at liberty.

38. A.I.R. 1951 Pat. 439 (2): 6
D.L.R. (Pat.) 24.

39. A.I.R. 1952 S.C. 395.

40. A.I.R. 1951 Bom. 33.

41. A.I.R. 1950 All. 709.

42. *Narasayya v. Hyderabad State*,
A.I.R. 1951 All. 79: 6 D.L.R.
Hyd. 31; *Narayanamma v. State*
of Hyderabad, 6 D.L.R. Hyd. 33.

In *Revana Siddiah v. State of Mysore*,⁴³ it was pointed out that merely because a ground was vague it could not be considered that it was no ground at all and therefore not sufficient to satisfy the authorities and a vague ground did not stand on the same footing as an irrelevant ground which could have no connection at all with the satisfaction of the Government.

In *Ramanlal v. Commissioner of Police, Calcutta*,⁴⁴ it was held that vagueness of grounds was not an abstract notion but was always to be examined by the test whether the grounds permitted the detenu to make an effective representation or not. The sufficiency of the grounds to that extent alone could be determined by a court which was, however, precluded from considering the sufficiency of the grounds in relation to the subjective satisfaction of the Government.

In *Durgh Singh v. State*,⁴⁵ it was held that when the grounds were so vague that the detenu could not make an effective representation he had a right to approach the court and complain that there had been an infringement of his fundamental right and even if the infringement of the second part of the right under Art. 22 (5) was established, he was bound to be released by the court.

In *Durgh Singh v. The State*^{45a} it has been posited that where the grounds are so vague that the detenu cannot make an effective representation he has a right to approach the court and complain that there has been an infringement of his fundamental right and even if the infringement of the second part of the right under Art. 22 (5) is established he is bound to be released by the court.

In *Shri Krishna Sarma v. State of W. B.*,^{45b} it has been held "that even singly, far more so collectively, the grounds are conclusions drawn from the available facts showing that suspected activities of the detained persons fell within the category of prejudicial acts affecting the maintenance of supplies essential to the community." A ground though sparse in detail yet if sufficiently definite to furnish details for proper representation cannot be called vague.

Though all grounds were not equally "full" yet if they were capable of being intelligently understood and were sufficiently definite to furnish materials to enable effective representation they cannot be termed vague.^{45c} But if the grounds are so vague as merely to suggest that the detenues were "Budmashes, and schemers" with no other details of overt act, the detention order is illegal.^{45d} Sufficiency of particulars furnished to detenu is justiciable.^{45e} Sufficient particulars of each of the grounds has to be furnished to the detenu subject of course to a claim of privilege under Art. 22 Cl. (6).^{45e} Denial of this constitutional right offends also the guarantee of procedure established by law under Art. 21.^{45f} Grounds which are vague and which cannot be understood by the detenu so as to afford a real opportunity of making a

43. I.L.R. (1951) Mys. 455: A.I.R. 1952 Mys. 85.

44. A.I.R. 1952 Cal. 26.

45. A.I.R. 1951 Raj. 77.

45a. A.I.R. 1953 Raj. 177.

45b. A.I.R. 1954 Cal. 591.

45c. *Shri Krishna Sharma v. State of W. B.*, A.I.R. 1954 Cal. 591.

45d. *Panna Ram Pat Ram v. State*, A.I.R. 1954 Pun. 133.

45e. *Shibban Lal Saxena v. State of U.P.*, A.I.R. 1954 S.C. 179: 1954 S.C.R. 418.

45f. *Abdul Ghani Goir v. State*, A.I.R. 1955 J. & K. 38.

representation against the detention order are *ultra vires* of Art. 22 (5).^{45g} The High Court can certainly question if the order of detention gives sufficient particulars to enable effective representation by the detenu. But it cannot look into the reasonableness or the sufficiency of the urgency that impelled the Government to make the order.^{45h} Grounds when vague and have no probative value being wholly irrelevant to the maintenance of public order or security of the State, the detenu deserves to be released.⁴⁵ⁱ

It is incumbent that the grounds are prepared soon after the detention if not simultaneously with it or prior thereto and the fact of detention along with grounds thereof has to be reported by the District Magistrate to the State Government and by the State Government if it has approved the detention to the Central Government together with the grounds on which the order has been made.^{45j}

Where one of the many grounds is vague it is enough to render the detention order illegal.^{45k}

The High Court is not concerned with

- (1) the sufficiency of the grounds but only
- (2) that the grounds should have relation with the objects marshalled in Art. 22 and S. 3 of the P.D. Act;
- (3) that they are not vague grounds, even one of them, but this is subject to the privilege mentioned in clause (6) of Art. 22;
- (4) that the detention is not *mala fide*.^{45l}

Where the grounds and reasons for detention are contained clearly in one paragraph and other paragraphs are only a compendium of facts and particulars on which the subjective satisfaction of the statutory authority was based for coming to the conclusions mentioned in the first paragraph, any vagueness or irrelevancy in the later paragraphs will not affect the order of detention.^{45m}

The *ratio decidendi* of the Supreme Court decisions is:—⁴⁵ⁿ

(1) Whether the grounds given are sufficient or not is not within the ambit of the decision of the Court. It is the subjective decision of the Government which is implied.

(2) There must be a rational connection between the grounds stated by the Government and the objects which are to be prevented under the statute.

(3) The grounds must not be vague and this applies to each one of the grounds communicated to the detenu. This is subject to the claim of privilege under Clause (6) of Art. 22.

45g. *In re Laurence Joachim Joseph D'Souza*, A.I.R. 1955 N.U.C. (Bom.) 5548.

45h. *Kesari Singh v. The State*, A.I.R. 1955 N.U.C. 5556.

45i. *Sita Ram Kishore Puria v. State of Bihar*, A.I.R. 1956 Pat. 1.

45j. *Thakur Singh Bhim Singh v. State*, A.I.R. 1957 Raj. 5 (D. 3).

45k. *Niren Babu v. State of W. Bengal*, 60 C.W.N. 464; A.I.R. 1957 Cal. 74 (D.B.).

45l. *Prem Nath Bazaz v. Union of India*, A.I.R. 1957 Punj. 235, I.L.R. (1956) Punj. 374.

45m. *Mohd. Ishaq v. U.P. State*, A.I.R. 1957 All. 782.

45n. *Premnath Bazaz v. Union of India*, A.I.R. 1957 Punj. 235; I.L.R. (1956) Punj. 374; refers to A.I.R. 1951 S.C. 157; A.I.R. 1951 S.C. 14; A.I.R. 1953 S.C. 318; A.I.R. 1954 S.C. 276; A.I.R. 1954 S.C. 179.

(4) Even if one of the grounds is vague and others are not, the detention is not in accordance with the procedure established by law and therefore is illegal.

(5) A detenu can challenge his detention in a court of law on the ground of *mala fides*.⁴⁵ⁿ

But facts as such need not be given under the second category above and it was held in the instant case it was enough if there was indication as to the nature of the activities objected to.⁴⁵ⁿ Where one or more of grounds are found to be vague it offends Cl. (5) of Art. 22.^{45p} The grounds of preventive detention are required to be prepared soon after the detention if not simultaneously with it or prior thereto and the fact of detention along with the grounds has to be reported by the District Magistrate to the State Government and by the State Government, if it has approved of the detention, to the Central Government together with the grounds on which the order has been made.^{45q} In the instant case^{45q} the arrest was on 30th Jan. 1956, the detention was declared *ultra vires* since neither the District Magistrate nor the grounds were for the first time supplied as late as 3rd Feb. 1956. The State, however, approved of the detention of the petitioner, although apparently no grounds were submitted to it within twelve days thereof. The order of detention was declared *ultra vires* since neither the District Magistrate nor the State Government had the proper material on the basis of which detention could be ordered or approved.^{45r}

Where the grounds have no rational probative value and are extraneous to the scope or purpose of the object in view as laid down by law, the detenu can successfully question the order of detention.^{45s}

The grounds of detention have a rational connection with the objects which the detenu had to be prevented from attaining. This principle was emphasised by the Supreme Court in *Puranlal Lakhanpal v. Union of India*^{45t} where the objects were to prevent the appellant from acting in a manner prejudicial (1) to the security of India, (2) and her relations with foreign powers. The grounds included the following:

"That you addressed a Press Conference at New Delhi on 18th day of February 1956 which was attended by a large body of Press correspondents of foreign countries and that you made a speech (copy annexed) containing various false statements about the conditions of the people of Kashmir. The combined effect of these statements is prejudicial to the security of India and to the relation of India with foreign powers."

No hard and fast rule can be laid down to determine the vagueness or otherwise of the grounds supplied to the detenu. Each case will have to be decided on its own facts and circumstances.^{45u} It is the duty of the detaining authority to formulate the statement of grounds against the detenu in a precise and concise manner and the authority should avoid undue prolixity in

45p. *Naren Babu v. State of West Bengal*, A.I.R. 1957 Cal. 74.

45q. *Thakur Bhim Singh v. State*, A.I.R. 1957 Raj. 51.

45r. *Ibid.*

45s. *Ibid.*

45t. A.I.R. 1958 S.C. 163.

45u. *Mool Singh v. State*, A.I.R. 1958 Raj. 158. See also *S. Salehuddin v. State of Andhra Pradesh*, A.I.R. 1958 Andh. Pra. 73.

the drawing up of the grounds so that unnecessary complications are avoided. The grounds should, consistently with the privilege not to disclose facts not desirable in public interest, be as full and adequate as the circumstances permit and any departure from this condition would amount to a violation of Art. 22 (5).^{45u}

In *Muthuvamalinga Thevar v. State of Madras*,^{45v} it has been pointed out that in a writ petition it is not open to the petitioner to canvass the factual correctness of the grounds of detention even for the limited purpose of deciding whether the order of detention is *mala fide*. The report of the Advisory Board under S. 10 of the Preventive Detention Act is not equivalent to a judgment or order of a judicial or quasi judicial tribunal. It is no doubt true that S. 10 (2) draws a distinction between the report of an Advisory Board and its opinion. But the section does not prescribe as to what the report should contain. Having regard to the provisions of S. 10 (3) which makes the report of the Board confidential what is really required is the unambiguous opinion of the Board and the factual existence of a report setting out the reasons for the opinion is not a condition precedent for the exercise of power by Government under S. 11 of the Act.

The report is kept confidential even from the court. The court is not entitled to examine the report even to verify whether it satisfies what Sec. 10 requires. All that the legislature provided for was that there should be no ambiguity about the opinion of the Advisory Board's report to the Government.^{45v} It must be said that it is hard on the detenu if even the court cannot look into the report and satisfy itself that Sec. 10 is complied with in full by the report. That the court can ascertain as to the existence of a report only is hardly any solatium to the detenu.

It has been further held in *Muthuvamalinga Thevar's case* that it is not open to the petitioner to challenge in *habeas corpus* proceedings under Art. 226, before the High Court, the factual correctness of a ground as set out in the grounds of detention, when the petitioner had an opportunity to challenge the correctness of the allegations in the proceedings before the Advisory Board in which he fully participated. The High Court cannot embark on the investigation of facts to verify if the allegation was factually true or not. The detaining authority has to verify whether that allegation was true before it reaches its subjective satisfaction on the need to order the detention. If the court has no jurisdiction to investigate the factual position by taking evidence at this stage, the purpose to be served by such an investigation would appear to be immaterial. Such an investigation is barred even for the purpose of establishing *mala fides* of the Government in confirming the order of detention.

In *S. Salehuddin v. State of Andhra Pradesh*^{45w} it was stated that as a rule, the antecedents and past activities of a person or body of persons or an organisation would furnish reasonable grounds for finding out the present attitude of the person or the body of persons or organisation for arriving at the conclusion whether he or the organisation is actually acting or likely to act in a manner prejudicial to the security of the state and the maintenance of

45v. A.I.R. 1958 Mad. 425; 1958 Cr. L.J. 1047.

45w. A.I.R. 1959 And. Pra. 73; relies

on A.I.R. 1951 S.C. 481; A.I.R. 1957 S.C. 28. A.I.R. 1952 Hyd. 112 and A.I.R. 1950 All. 709.

public order. If the present conduct reveals that it is rooted in objectionable acts and activities of the past there is no reason why those past activities should not be considered at all. The object of preventive detention is to prevent likely prejudicial activity in the immediate future on the part of a person and reasonable apprehension as to it may be based on past conduct.^{45w}

We must, however, add that a leaning on past conduct is not a reliable test. The Detention Act is bad enough in curtailing a man's liberty without trial. If past conduct is also a test, the Act becomes more detestable as no judicial review at all is provided. In the Andhra case^{45w} it was made worse by holding that the distance of time is immaterial unless there was practically no connection between the past and present activities.^{45x}

Clauses (5) and (6) of Art. 22 make it obligatory on the Government to disclose all the grounds on which the order has been made though not all the facts constituting such grounds. In other words although the Government may not in the public interest disclose the full particulars of the grounds supplied the Government is bound to disclose all the grounds on which the order of detention is based.^{45y} Where the state takes recourse under Cl. (6) it must prove that the authority concerned was satisfied that it was not in public interest to disclose facts upon which the grounds for detention were based.^{45y} But habitual criminals may not be detained under the Act as that is adequately dealt with in the Criminal Procedure Code^{45z}.

Article 22, Clause (6).

This is the safeguarding clause for the Government not to disclose facts which are against public interest. It must be noted that there is a full obligation to disclose all the "grounds" though not all the facts. What facts are against public interest is left to the subjective satisfaction of the authority and is not justiciable. In some pre-Constitution cases⁴⁶ court was given the power to question the discretion of the authority if it acted capriciously. But now Art. 22 (5) and (6) bars that jurisdiction. All grounds have to be disclosed, not all facts, particularly those against public interest in the opinion of such authority. It may be stated that it were better if the court had been given the power to scrutinize if the exercise of the power under Cl. (6) was *bona fide*. No doubt we have the clause based on the doctrine enunciated by Lord Maugham in *Liveridge v. Anderson*:⁴⁷

"It is beyond doubt that he can decline to disclose information on which he has acted on the ground that to do so would be contrary to public interest. There must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature."

What is prohibited is "facts" which are against public interest. This does not mean, however, that all other facts should necessarily be disclosed. What is obligatory is, there must be a sufficiency of grounds with facts supplied sufficient to enable effective representation. In *State of Bombay v. Atma*

45x. *Ibid.* A.I.R. 1952 Bhopal 6 and A.I.R. 1951 Bom. 161 and A.I.R. 1950 Mad. 162 explained and distinguished.

45y. *Sangappa Mallappa Kodli v. State of Mysore*, A.I.R. 1959

Mys. 7.

45z. *Ibid.* Obiter per Das Gupta, J., at p. 11.

46. (1942) A.C. 206.

47. 1942 A.C. 206.

Ram,⁴⁸ it was posited, "They are given a special privilege in respect of facts which are considered not desirable to be disclosed on public interest. As regards the rest, their duty is to disclose facts so as to give the detained person the earliest opportunity to make a representation against the order of detention. . . . Art. 22 (6) gives a right to the detaining authority not to disclose such facts but from that it does not follow that which is not stated or considered to be withheld on that ground must be disclosed and if not disclosed there is a breach of the fundamental right. A wide latitude is left to the authorities in the matter of disclosure."

It therefore means that the court can interfere only on the ground that what has been stated is insufficient for making a representation and not on the ground that what has been withheld should have been disclosed. This is the majority view in *Atma Ram's case*. It is however better to quote Sastri, J.'s separate minority judgment where he says, "The combined effect of clauses (5) and (6) is to my mind to require the detaining authority to communicate to the person affected only such particulars as that authority and not a Court of Law, considers sufficient to enable the said person to make the representation." In other words Sastri, J., feels rightly that even the "sufficiency" of grounds to enable a representation appears to be in the control and satisfaction of the detaining authority. It is therefore submitted that constitutional position must be so amended as to make the court the arbiter as to whether the facts withheld are really in the interest of the public or if it is capriciously withheld. Otherwise the guarantee and safeguards afforded in Art. 22 (5) and (6) do not appear to be real.

Judicial Interpretation.

In *Bompalli Sathia v. Government of Hyderabad*,⁴⁹ the Full Bench opined that the correctness of the statement relating to the past activities of a detenu contained in the grounds of detention was not justiciable. The satisfaction under Sec. 3 being a subjective one no court could substitute its opinion on the material for that of the authority directing detention and thereby hold the satisfaction to be wrongly reached. There is, however, a difference between irrelevant ground and incorrect ground. The court has jurisdiction to consider a ground irrelevant and discharge the detenu. But to hold the ground as incorrect an adjudication of relevant fact is necessary which means jurisdiction to order production of the relevant data and this jurisdiction cannot be exercised in view of Art. 22, Cl. (6). It was further posited that a ground could be said not vague by a simple test. If on reading the ground furnished it was capable of being intelligently understood and was sufficiently defined to furnish materials to enable the detained person to make representation against the order of detention it could not be called vague.

In *re Maganlal Jivanbhai Patel*,⁵⁰ it was pointed out that the only possible and reasonable construction that can be put upon the language of Art. 22 (6) was that the detaining authority while furnishing grounds of detention was required to state facts on account of which it was satisfied that the detention was necessary in the interests of security of State, maintenance of public order, etc. The only privilege a detaining authority can claim against disclosure of facts "is on grounds of public interest." If no facts at all leading to the detention of a detenu are to be mentioned in the grounds which are

48. *Ujagar v. State of Punjab*,
(1951) S.C.R. 187; 7 D.L.R. 16
(S.C.): 1951 S.C.J. 208.

49. A.I.R. 1951 Hyd. 162.
50. A.I.R. 1951 Bom. 33.

to be furnished to him, then obviously the intention underlying the enactment of Art. 22 (6) is frustrated.

In *Sajatulla Khan v. Chief Secretary to Government of West Bengal*,⁵¹ it was stated that Art. 22 (6) did not empower the authorities to refuse to disclose the grounds in public interest. All that they could refuse to disclose were facts which would be harmful to public interest if they were disclosed. There was a clear difference between grounds and facts. The facts were really the evidence upon which the basis of allegations were to be established.

In *Dayanand Modi v. State of Bihar*,⁵² it was posited that Art. 22 (6) made a restriction that the detaining authority need not disclose facts which that authority considered to be against the public interest to disclose. There was a distinction made between grounds and facts. The grounds were based on and arise out of the facts. The court was concerned only with such facts as had been disclosed and on which the grounds were based in order to find whether there had been any failure to comply with the mandatory provision of Art. 22 (5) or whether there was *mala fides* or whether it was bad for any other reason.

In *Narayanaraju v. Secretary, Government of Madras*,⁵³ Chandra Reddy, J., pointed out that while it was obligatory to furnish grounds sufficient to enable representation it was not obligatory to furnish particulars or basis of the allegations. His Lordship went so far as to express, "If the detaining authority is required to give the particulars of the grounds the effect of Cl. (6) of Art. 22 will be reduced to a zero. . . . It is now well-settled that the satisfaction contemplated in Sec. 3, Preventive Detention Act, is that of the detaining authority and since that section has provided only for a subjective standard and not an objective standard of satisfaction we do not see why the particulars of the reasons for detention should be furnished to the detenu." This view in the instant Madras case finds approval in *State of Bombay v. Atma Ram*⁵⁴ where Das, J., stated, "The omission from our Constitution of the provision of communicating the particulars in addition to the grounds which were to be found in certain legislative enactments is significant, yet it may be deliberate. . . In my opinion on a plain reading of clause (5) there is no justification for assuming that a second communication of particulars is contemplated either under the first part or the second part of clause (5). This does not, however, mean that the authority may not supply particulars either *suo motu* or on the application of the detenu. All that I say is that Cl. (5) imposes no constitutional obligation on the authority to supply particulars." Patanjali Sastri, J., concurred with the minority view of Das, J., while the majority in that case decided the case on the ground that amplifying ground already furnished with further particulars was not hit by Art. 22 (5).

Clause (6) of Art. 22 makes a rather serious inroad upon the right of the detained person and leaves it to the detaining authority in public interest to withhold material and facts from the detenu even though such action may seriously prejudice the detenu making a representation. The detaining authority must claim this privilege at the time of furnishing the grounds to the detenu.^{54a} This privilege under Cl. (6) can be claimed by the detaining authority even if it has not informed the detenu at the time of communicating

51. 5 D.L.R. (Cal.) 153: 55 C.W.N. 27: A.I.R. 1951 Cal. 194.

52. A.I.R. 1951 Pat. 47: 6 D.L.R. Pat. 109.

53. A.I.R. 1951 Mad. 182.

54. 1951 S.C.J. 208: 6 D.L.R. 216 (S.C.).

54a. In re Laurence Joachim Joseph D'Souza, A.I.R. 1955 N.U.C. (Bom.) 5548.

to him the grounds of his detention that it had withheld further facts as it was against the public interest to disclose them.^{54b}

The right under Art. 22 (5) to be furnished particulars is subject to the limitation under Art. 22 (6) whereby disclosure of facts considered to be against public interest cannot be required. Both the obligation under Art. 22 (5) and the duty under Art. 22 (6) are vested in the detaining authority, not in any other.^{54c} But there is no obligation under Art. 22 (5) and (6) to communicate to the detenu the decision not to disclose the facts as well as the ambit of the non-disclosure at the time when the grounds are furnished. The necessity for such a communication would arise impliedly only if the detenu, feeling the grounds to be vague, asks for particulars.^{54c}

In *Ram Manohar Lohia v. Supdt., C.P., Fatehgarh*^{54d} it has been posited that if the legislation permitting detention is in conformity with Articles 20 to 22, the mere fact that it indirectly affects the freedoms under Art. 19, will not make it a void legislation. So the crucial point to be determined is what is the exact action which the impugned legislation hits at. If it is the curtailment of any of the freedoms guaranteed under Art. 19 then it has to be judged with reference to the provisions of that Article, but if on the other hand if those freedoms are affected as an indirect result of a legislation authorising punitive or preventive detention then the provisions of Art. 19 are not to be taken into consideration.

Article 22, Clause (7).

Powers of Parliament.—Clause 7 of Art. 22 enables Parliament to prescribe—

1. Either (a), the circumstances under which or (b) the class or classes of cases in which a person may be detained for a period longer than three months without reference to any Advisory Board.

2. The maximum period for preventive detention under any legislative enactment.

3. The procedure to be followed by the Advisory Board in an enquiry under Art. 22 (4) (a).

Sub-clause (a), Cl. 7.—In Art. 22 (7) (a) the words used are “The circumstances under which and the class. . . .” Here the word “and” has to be read in a disjunctive sense meaning “or”.

In *A. K. Gopalan's case*⁵⁵ Kania, C.J., described “‘circumstances’ to mean ‘events or situations extraneous to the actions of the individual concerned’ while a ‘class of cases’ mean determinable groups based on the actions of the individuals with a common aim or idea. . . . It is obvious that the classification can be by grouping the activities of the people or by specifying the objectives to be attained or avoided.”

Mukerjea, J.,⁵⁶ said that “classes of cases mean determinable groups, the individuals comprised in each group being related to one another in a particular way which constitutes the determining factor of that group. ‘Circumstances’ on the other hand connote the situations or conditions which are

54b. *Irappa Nagappa v. The State*, A.I.R. 1955 N.U.C. (Bom.) 5551.

54c. *Lawrence D'Souza v. State of Bombay*, A.I.R. 1956 S.C. 531; C.L.R. 1956 S.C. 367.

54d. A.I.R. 1955 All. 193.

55. 1950 S.C.J. 174 at page 174. Kania, C.J.

56. 1950 S.C.J. 174 at pp. 282-3.

external to the persons concerned, e.g., war, rebellion, communal disturbances and things like that."

In effect sub-clause (a) of Art. 22 (7) indicates that legislation for preventing detention must be circumscribed by two factors. The need for enacting such a drastic law should be apparent on the face of it. Hence the Act must prescribe (1) class or classes of persons against whom the law has to be applied in relation to their activities and movements, (2) "Circumstances" which would be indicative of the condition and backgrounds against which dangerous activities call for special preventive measures under the Act. By this twofold precautionary ambit, the sphere of the application of the Act is sought to be limited to a special type of cases instead of it being abused indiscriminately.

Sub-clause (b).—This sub-clause empowers Parliament to prescribe the maximum period of detention for a class taken as a whole. The words "any person" before "may in any class or classes of cases be detained" do not mean that maximum for each person is contemplated. The maximum is for "all persons" in a class or "classes of cases". Again the maximum may be fixed by Parliament from time to time as often as it is necessary. In other words though the "maximum" has been fixed by Parliament, it is again open to that body to amend it periodically any number of times. By this device the Government can continue detentions indefinitely.⁵⁷

It may be noted that the Preventive Detention Act, 1950, as amended by the Act of 1951 does not prescribe any maximum period of detention. This enabled the Government to buttress itself with the opinion of the Advisory Board and then carry on the detention indefinitely. In *Gopalan's case* Sec. 11 of the Act was held *intra vires* of Art. 22, as cl. (7) (b) empowered Parliament to fix the maximum but nowhere was it made compulsory or obligatory to do so. Hence a detenu could be kept in detention for any length of time but within the duration of the Act which is a temporary measure. If the Act is extended the "detention" also get further extension⁵⁸ [*vide notes supra* under Art. 22 (5)]. The period of detention is finally determined after the opinion of the Advisory Board is received and the maximum is laid in Sec. 11 (a) (b), Amending Acts LXI of 1952 and XII of the Act of 1950 read with Art. 22 (7).⁵⁹

Sec. 11-A fixes it as twelve months from the date of detention and Sec. 12 validates the detention for the duration of the Act.

Sub-clause (c).—This clause states the power of Parliament to prescribe the procedure to be followed by the Advisory Board in an enquiry under sub-clause (a) of clause (4). This procedure is set out in Sec. 10 of the Preventive Detention Act, 1950, as amended in 1951, (*vide* Act and notes below).

In *A. K. Gopalan's case*⁶⁰ it has been held that Sec. 10 is *intra vires* of Art. 22 (7) (c) as Parliament has unlimited powers to regulate the procedure of these Advisory Boards. There is no right extended to the detenu to

57. *Shama Rao v. D. M. Thana*, (1952) S.C.R. 683.

58. *Ram Adhar v. State*, A.I.R. 1951 All. 18; see contra *Teja Singh v. State*, A.I.R. 1951 Pepsu 1; *Bashir v. State*, A.I.R. 1951 All.

357.

59. *Ujagar Singh v. State of Punjab*, 1952 S.C.R. 368.

60. 1950 S.C.J. 174 at p. 193, Kania, C.J.

challenge the 'procedure' in court unless the Board acts contrary to the rules of natural justice. In *Gopalan's case*⁶⁰ it was held "that Art. 22 (5) does not extend a fundamental right to be heard by an independent tribunal. The Constitution deliberately stops at giving the right of representation. This is natural because under Art. 22 (7) the Constitution permits the making of a law by Parliament in which reference to an Advisory Board may be omitted. To consider the right to make a representation as necessarily including a right to be heard by an independent judicial administration or Advisory Council will thus be directly in conflict with the express words of Art. 22 (7)."

Their Lordships negated the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice. In *Local Government Board v. Aldridge*⁶¹ Viscount Holdane, L.C., rejected the contention about the necessity of an oral hearing stating, "But it does not follow that the procedure of every tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which, in the main, the procedure must conform. But what that procedure is to be in detail must depend upon the nature of a tribunal."

Similarly the right to lead evidence against facts suspected to exist is also not essential in the case of preventive detention. Art. 22 (6) permits the non-disclosure of facts.

The right of representation does not include the right to appear in person or by lawyer before the Advisory Board. Art. 21 enjoins procedure established by law. Art. 22 (1) though it gives right to consult or be defended Art. 22 (3) excludes this in the case of preventive detention law. Yet again Art. 22 (7) empowers Parliament to prescribe the procedure and there is no limitation to that power and such law would satisfy Art. 21 aforesaid.

Thus ultimately "Rules of natural justice" in practical effect would mean what Parliament considers as proper procedure. It is thus left to Parliament's wisdom and good sense to remedy all the defects, whenever it feels it expedient and just.

Judicial Interpretation.

In *Mrs. Godavari Parulekar v. State of Bombay*⁶² the Supreme Court held: "Preventive Detention Second Amendment Act (LXI of 1952) extended the life of the principal Act IV of 1950 till 31st December 1954. Therefore in the absence of Sec. 11-A all the old detentions would have been extended till that date. But Sec. 11-A modified that period and put 1st April 1953 as the latest date, for them. Sec. 11-A therefore conferred a benefit and is not unreasonable. But it is inevitable that the length of detention will vary in each individual case; for it is in the discretion of the Government to fix the period of detention. Classification of detentions into those before and after 30th September 1952 is therefore not discriminatory within the meaning of Arts. 22 (7) (b) and 14 of the Constitution. Sec. 11-A is therefore *intra vires*."

In *Shama Rao v. Parulekar v. District Magistrate, Thana, Bombay*,⁶³ the Supreme Court opined Sec. 3 of the Detention Act was *intra vires* of Art.

61. (1915) A.C. 120. See also *Federal Communications Commissions v. W. F. R. The Goodwill Station*, 337 U.S. 265 at 276.

62. A.I.R. 1953 S.C. 52.

63. A.I.R. 1952 S.C. 324: 7 D.L.R. 380 (S.C.).

22 (4) and (7). The latter provisions do not envisage the direct intervention of Parliament in a whole batch of cases. Parliament can prescribe the minimum period for a class taken as whole as it has done in Sec. 3. It cannot be said that once the power given under clause (7) to fix a maximum period has been exercised, the power exhausts itself and cannot be exercised again in respect of the same detention. There is no such limitation on powers of Parliament in the Constitution. Further it cannot be said Sec. 3 is *ultra vires* and a fraud upon the Constitution as it fixes no time limit because the section specifies the period of detention, namely, till the expiry of the Preventive Detention Act, 1950, *i.e.*, 1st December 1952. Nor is it repugnant to the Constitution on the ground that Parliament is enabled to continue detentions indefinitely by the expedient of periodic amendments in the Act of 1950 because Parliament has the power.

In *Ujagar Singh v. State of Punjab*⁶⁴ it was held that Sec. 12 of the Preventive Detention Act did not require that the period of detention should be specified in the order itself—the section itself provided that he could be detained without the opinion of an Advisory Board for a period longer than three months but not exceeding one year from the date of detention. Under Sec. 22 (4) (a) read with Art. 22 (7) (a) detention for more than three months can be justified either on the ground of an opinion of the Advisory Board or on the ground that the detention is to secure the due maintenance of public order, in which case it cannot exceed one year in any event as stated in Sec. 12. In view of these provisions the non-specification of any definite period in the detention order is not a material omission rendering the order itself invalid.

In *A. K. Gopalan v. State of Madras*,⁶⁵ the Supreme Court held that a State could not authorize detention beyond the maximum period prescribed by Parliament under Art. 22 (7) as any such transgression would offend “the procedure according to law” clause in Art. 21. Parliament cannot also make a law authorizing detention beyond three months without the intervention of an Advisory Board, unless the law conforms to the conditions laid down in cl. (7) Art. 22. Cl. (7) enables Parliament to prescribe the procedure to be followed by Advisory Boards as a safeguard against any arbitrary procedure. Sec. 10 (3) is not *ultra vires* merely because the right to appear in person or by lawyer is denied or the disclosure of the report of the Board is prohibited since Art. 22 (7) confers full powers to Parliament to lay down the procedure. Sec. 11 is *intra vires* as Parliament is not bound to fix the maximum period under Art. 22 (7). Sec. 12 is *intra vires* though it has merely copied the legislative entries and has not specified the circumstances as require to be specified under Art. 22 (7) (a); for the subject-matter of entries may very well be considered as “circumstances” or “classes of cases” for which preventive detention may be ordered.

In *Brahmeswar Prasad v. State of Bihar*⁶⁶ it was pointed that Art. 22 (7) merely entitled the President to specify circumstances, define classes in which a person might be detained under any pre-existing law for preventive detention but without those limitations imposed by Art. 22 (4). It did not authorize making a new detention law that could stand by itself. Art. 22 (7) was never intended to be a means of avoiding operation of Art. 13 (1). It was

64. A.I.R. 1952 S.C.J. 350: 7 D.L.R. 416 (S.C.)

65. 1950 S.C.J. 174: (1951) 6 D.L.R.

313.

66. A.I.R. 1950 Pat. 266: 5 D.L.R. 221.

intended for prospective and not retrospective operation. No order or law made under Art. 22(7) can operate upon a law which has already become void under Art. 13(1).

In *A. S. Prasad Rao v. Provincial Government, C. P. and Berar*,⁶⁷ it was pointed out that "any law" in Art. 22(7)(b) go with the words "providing for preventive detention"; such law might or might not be in existence on the date on which Parliament fixed the maximum period. Indeed there is nothing in the clause to prevent Parliament from providing for the maximum period in the same law in which it provides for preventive detention in any class or classes of cases.

The right of the detenu to be furnished with facts or particulars is subject to the limitation embodied in Cl. (6) and even if the grounds communicated are not as precise and specific as might be desired, the appropriate authority has the right to withhold such facts or particulars, the disclosure of which it considers to be against public interest.⁶⁸

Legislative Entry.

Sch. VII, List I, Entry 9 provides legislative power for preventive laws for reasons connected with defence, foreign affairs, or the security of India. In List III, Entry 3 is the concurrent power for the State as well as the Centre for legislating preventive laws for other reasons such as security of State, public order, supplies and services essential to the community.

THE PREVENTIVE DETENTION ACT.⁶⁹

It is appropriate to refer to the Preventive Detention Act of 1950 at this stage after the close of our commentary on Art. 22(7).

Preventive Detention Act 1950 (IV of 1950) as amended by Acts L of 1950, IV of 1951 and Acts XXXIV and LXI of 1952.

Act IV of 1950 came into force on 25th Feb., 1950; Act L of 1950 came into force on 14th Aug., 1950; Act IV of 1951 came into force on 1st March, 1951; Act XXXIV of 1952 and LXI of 1952 came into force on 30th Sept., 1952.

Amendments to the Act.—The decision of *Goplan v. State*⁷⁰ declared Sec. 14 of the Act *ultra vires* and so this section was repealed by the Preventive Detention (Amendment) Ordinance XIX of 1950 which effected also some changes in Sec. 3. Act L of 1950 merely incorporated all the amendments made by the Ordinance XIX of 1950 and repealed the Ordinance. Act IV of 1951 was enacted as Act IV of 1950 was due to expire on 1st April, 1951. In the objects and reasons, it was stated, "The Preventive Detention Act, 1950 (IV of 1950) is due to expire on 1st April, 1951. Government after very careful examination, have come to the conclusion that it is necessary to extend its life, for the present, for a period of one year. The primary reason for the enactment of this legislation was the necessity to protect the country against violent activities organised in secrecy and intended to produce chaos. These activities though reduced in tempo have not ceased and Government

67. 1950 N.L.J. 233.

68. *Puranlal Lakhanpal v. Union of India*, A.I.R. 1953 S.C. 163. Follows A.I.R. 1951 S.C. 157; A.I.R. 1956 S.C. 531.

69. See Author's "Law of Preventive Detention" (M.L.J. 1955 Edition).

70. A.I.R. 1950 S.C. 27; 6 D.L.R. 313; 1950 S.C.J. 174.

consider it essential that the powers conferred by the Preventive Detention Act should be continued. The Act also enables Government to detain persons for reasons connected with the maintenance of essential supplies and services. With the deterioration in the food situation, the need for maintaining such supplies and services has become more pressing than ever.

"Opportunity has been taken to liberalise the provision regarding reference to Advisory Boards. Secs. 9 and 12 of the Act which require such reference to be made only in limited class of cases, and provide for review by a judicial officer in other cases are sought to be modified so that a reference to the Advisory Boards consisting of three persons will be compulsory in all cases of preventive detention. It is further proposed to make it clear that no person will be kept under detention unless upon such reference, the Advisory Board reports within ten weeks of his detention that there is sufficient cause for detention. Another important Amendment which is proposed in the Bill is an express provision enabling Government to release detained persons on parole."

It may be noted that the Amendment Act (V of 1951) has been declared valid by the Supreme Court in *Krishnan v. State of Madras*.⁷¹

The Amending Act LXI of 1952 deleted the proviso to Sec. 8(2) and inserted Sec. 11-A by which for the first time the maximum period of detention is fixed in the Act. Section 13(2) was recast with a view to confining the making of a fresh order of detention to the case where there are fresh facts justifying the fresh order. The old Sec. 13(2) ran thus: "The revocation of a detention order shall not bar the making of a fresh detention order under Sec. 3 against the same person." The new sub-sec. (2) of Sec. 13 limits it to a case of fresh facts justifying such order. Thus the decision in *Dattatreya v. State of Bombay*,⁷² to the effect that the detaining authority may extend the period of detention from time to time subject to the overall limit of the duration of the Act is superseded by the new sub-sec. 13(2). The Amending Act extends the life of the Act till 31st December, 1954.

The Preventive Detention Act IV of 1950 (as amended up to 30th Sept. 1952).

An Act to provide for Preventive Detention in certain cases and matters connected therewith.

Be it enacted by Parliament as follows:—

1. *Short title, extent and duration.*—(i) The Act may be called THE PREVENTIVE DETENTION ACT, 1950.

(ii) It extends to the whole of India:

Provided that it shall not apply to the State of Jammu and Kashmir except to the extent to which the provisions of this Act relates to Preventive Detention for reasons connected with defence, foreign affairs or the security of India.

(iii) It shall cease to have effect on the 31st day of December, 1954, save as respects things done or omitted to be done before that date.

2. *Definitions.*—In this Act unless the context otherwise requires:

71. (1951) S.C.R. 621; A.I.R. 1951 S.C. 301; (1952) 7 D.L.R. 1 (S.C.).

72. A.I.R. 1952 S.C. 181.
Note:—The next footnote starts with serial No. 42.)

(a) 'State Government' means in relation to Part 'C' State the Lieutenant-Governor or as the case may be, the Chief Commissioner of the State;

(b) 'Detention Order' means an order under S. 3;

(c) 'appropriate Government' means as respects a detention, order made by the Central Government and as respects a detention order made by a State Government, or by an officer, subordinate to State Government or as respects a person detained under such order, the State Government.

3. *Power to make orders detaining certain persons:*—(1) The Central Government or the State Government may:

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(1) the defence of India, the relation of India with foreign powers or the security of India;

(2) the security of the State or the maintenance of public order; or

(3) the maintenance of supplies and services essential to the community; or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946 (XXXI of 1946) that with a view to making arrangements for his expulsion from India it is necessary so to do, make an order directing that such person be detained.

(ii) Any of the following officers, namely:—

(a) District Magistrates;

(b) Additional District Magistrates specially empowered in this behalf by the State Government;

(c) The Commissioner of Police for Bombay, Calcutta, Madras or Hyderabad;

(d) Collector in the State of Hyderabad,

may if satisfied as provided in sub-clauses (2) and (3) of clause (a) of sub-sec. (1) exercise powers conferred by the said sub-section.

(iii) When any order is made under this section by an officer mentioned in sub-sec. (2) he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order made after the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government.

(iv) When any order is made or approved by the State Government under this section the State Government shall, as soon as may be, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have bearing on the necessity for the orders.

3-A. *Execution of Detention orders.*—A detention order may be executed at any place in India in the manner provided by the execution of warrants of arrest under the Code of Criminal Procedure, 1898 (Act V of 1898).

4. *Power to regulate place and condition of detention.*—Every person in respect of whom a detention order has been made shall be liable—

(a) to be detained in such place and under such conditions including conditions as to maintenance, discipline and punishment for breaches of discipline as the appropriate Government may by general or special order specify; and

(b) to be removed from one place of detention to another place of detention whether within the same State or in another State, by order of the appropriate Government:

Provided that no order shall be made by a State Government under Cl. (b) for the removal of a person from one State except with the consent of the Government of that State.

5. *Detention orders not to be invalid or inoperative on certain grounds.*—No detention order shall be invalid or inoperative merely by reason—

(a) that the person to be detained thereunder is outside the territorial jurisdiction of the Government or of officer making the order or

(b) that the place of detention of such person is outside the said limits.

6. *Powers in relation to absconding persons.*—(i) If the Central Government or the State Government or an officer specified in sub-sec. (2) of Sec. 3 as the case may be has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed that Government or Officer may—

(a) make a report in writing of the fact to a Presidency Magistrate or a magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of Secs. 87, 88 and 89 of the Code of Criminal Procedure 1898 (Act V of 1898) shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the official gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(ii) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898) every offence under Cl. (b) of sub-section (1) shall be cognizable.

7. *Grounds of order of detention to be disclosed to person affected by the order.*—(1) When a person is detained in pursuance of a detention order, the authority making the order shall as soon as may be, but not more than five days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

(2) Nothing in sub-sec. (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

8. *Constitution of Advisory Boards.*—(1) The Central Government and each State Government shall whenever necessary constitute one or more Advisory Boards for the purposes of the Act.

(2) Every such Board shall consist of three persons who are or have been, or are qualified to be appointed as, judges of a High Court and such persons shall be appointed by the State Government or the Central Government as the case may be.

(3) The appropriate Government shall appoint one of the members of the Advisory Board who is or has been a judge of a High Court to be its Chairman, and in Part C State the appointment to the Advisory Board of any person who is a judge of the High Court of a Part A State or Part B State shall be with the previous approval of the State Government concerned:

Provided that nothing in this sub-section shall affect the power of an Advisory Board constituted before the commencement of the Preventive Detention (Second Amendment) Act, 1952, to dispose of any reference under Sec. 9 pending before it at such commencement.

9. *Reference to Advisory Boards.*—In every case where a detention order has been made under this Act, the appropriate Government shall within thirty days from the date of detention under the order, place before the Advisory Board constituted under Sec. 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order and in case where the order has been made by an officer, also the report by such officer under sub-section (3) of Sec. 3.

10. *Procedure of Advisory Boards.*—(1) The Advisory Board shall, after considering the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case it considers it essential to do so or if the person concerned desires to be heard after hearing him in person, submit its report to the appropriate Government within ten weeks from the date of detention.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(2-A) Where there is a difference of opinion among the members forming the Advisory Board the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(3) Nothing in this section shall entitle any person against whom a detention order has been made, to appear by any legal practitioner in any matter connected with reference to the Advisory Board and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

11. *Action upon the Report of Advisory Board.*—(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period, as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion *no* sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

11-A. *Maximum period of Detention.*—(1) The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Sec. 11 shall be twelve months from the date of detention.

(2) Notwithstanding anything contained in sub-section (1) every detention order which has been confirmed under Sec. 11 before the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall, unless a shorter period is specified in the order, continue to remain in force until the first day of April, 1953, or until the expiration of twelve months from the date of detention whichever period of detention expires later.

(3) The provisions of sub-sec. (2) shall have effect notwithstanding anything to the contrary contained in Sec. 3 of the Preventive Detention (Amendment) Act, 1952 (XXXIV of 1952) but nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at an earlier time.

12. *Validity and duration in certain cases.*—For the avoidance of doubt it is hereby declared that—

(a) every detention order in force at the commencement of the Preventive Detention (Amendment) Act, 1951, shall continue in force and shall have effect as if it had been made under the Act as amended by the Preventive Detention (Amendment) Act, 1951 and

(b) Nothing contained in sub-section (3) of Sec. 1 or sub-section (1) of Sec. 12 of this Act as originally enacted shall be deemed to affect the validity or duration of any such order.

13. *Revocation of Detention Orders.*—(1) Without prejudice to the provisions of Sec. 21 of the General Clauses Act, 1897 (X of 1897) a detention order may at any time be revoked or modified—

(a) notwithstanding that the order has been made by an officer mentioned in the sub-section (2) of Sec. 3 by the State Government to which that officer is subordinate or by the Central Government; and

(b) notwithstanding that the order has been made by a State Government, or by the Central Government.

(2) The revocation or expiry of a detention order shall not bar the making of a fresh detention under Sec. 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an Officer, as the case may be is satisfied that such an order should be made.

14. *Temporary Release of Persons detained.*—(1) The appropriate Government may at any time direct that any person detained in pursuance of a detention order may be released for any specific period either without conditions or upon such conditions specified in the direction, as that person accepts and may at any time cancel his release.

(2) In directing the release of any person under sub-section (1), the appropriate Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) Any person released under sub-section (1) shall surrender himself at the time and place and to the authority specified in the order directing his release or cancelling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3) he shall be punishable with imprisonment for a term which may extend to two years or with fine or with both.

(5) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof.

15. *Protection of action taken under the Act.*—No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done in pursuance of this Act.

16. *Repeal.*—The Preventive Detention (Extension of Duration) Order, 1950 is hereby repealed.

COMMENTARY

Below is given the commentary under each section, wherever necessary, as most of the principles have been already dealt with under the commentary for Art. 22(5) to (7). What is relevant and new alone is dealt with hereunder.

Interpretation of the Act.—The Preventive Detention Act being a special Act has to be strictly construed; the maxim is the wider the powers, the greater is the caution intended for their exercise.⁴² As the Act makes a serious encroachment on the liberty of the individual and empowers the executive to keep a person in custody without trial, the provisions of the Act has to be very strictly construed in favour of the subject and against any arbitrary act in conflict with the mandatory provisions of the Act.⁴³ Mandatory provisions if disobeyed should result in the release of the detenu.⁴⁴ The purpose of the emergency legislation is to ensure public safety and therefore it is right to interpret it so as to promote rather than to defeat its efficacy for the defence of the State.⁴⁵ The rule of construction for peace-time legislation may not be applied to war-time or emergency statutes. The normal presumption that a legislation is not intended to interfere with vested rights has no bearing with reference to the construction of Special Court Criminal Courts Ordinance.⁴⁶ A construction favourable to the intention of the legislature in safeguarding the safety of the realm is more important than to find a construction favourable to the subject.⁴⁷ The words of the statute are to be interpreted in their real sense. Courts are not allowed to declare an Act void on a supposed opinion that it runs counter to the spirit of the Constitution though not its words. In *Gopalan v. State of Madras*⁴⁸ it was

42. *Bakhawar Singh v. The State*, A.I.R. 1951 Simla 157 at 161.

43. *S. G. Sardesai v. The Provincial Government*, A.I.R. 1949 All. 395.

44. *Sadhu Ram v. Crown*, A.I.R. 1951 Pepsu 6 at p. 11.

45. *Satiyoholla v. Emperor*, A.I.R.

1943 Nag. 36.

46. *Shree Kant Pandurang v. Emperor*, A.I.R. 1943 Bom. 169.

47. *Basanta Chandra v. Emperor*, A.I.R. 1945 Pat. 44.

48. A.I.R. 1950 S.C. 27; 1950 S.C.J. 174; 6 D.L.R. 313 (S.C.).

said, "It is difficult upon any general principle to limit the omnipotence of the sovereign Legislative power by judicial interposition except so far as the express words of a written constitution give that authority. . . . An assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own safety or the protection of private rights. . . . The Constitution must be interpreted in a broad and liberal manner giving effect to all its parts and the presumption should be that no conflict or repugnancy was intended by the framers."

The duty of Courts has been aptly put in *Sunil Kumar v. West Bengal Government*.⁴⁹ "It has always been the proud tradition of the Courts to stand between the subject and any encroachment on his liberty by the Executive or any other authority however high. It is a great tradition which has been inherited by the Courts. Amidst the strident clamour of political strife and the tumult of the clash of conflicting classes the Court remains impartial. The Court is no respecter of persons and its endeavour must be to ensure that above this clamour and tumult, the strong calm voice of justice shall always be heard. *Fiat Justitia ruat coelum*."

If the illegalities in a statute are not severable, the whole Act must be construed as *void*.⁵⁰ All legislation is prospective unless the contrary is specifically mentioned.⁵¹

Purpose of the Act.—The Detention Act is intended to take preventive measures for ensuring "public order", "public safety", "maintenance of public tranquillity", "security of the State" and preventing incitement of an offence.

"Public order" is wide enough to include a small riot or an affray and all cases where peace is disturbed by or affects a small group of persons. "Insecurity of the State" connote serious internal disorder which lead to disturbance of public tranquillity to such a degree as to jeopardise the security of the State.⁵² "Public safety" and "public order" are interchangeable words. The former term merely means security of the public or their freedom from danger.⁵³

The powers of the President under the Constitution (Art. 392) can be used during the transitional period for resolving any difficulties but this will not allow abridgement of Fundamental Rights under Part III of the Constitution. The powers of Parliament under Art. 22 cl. (7) are in no way inferior to the powers of the President. The Preventive Detention Law which pre-existed the Constitution is controlled by Art. 22 (7) in the matter of a definiteness of period for the existence and enforcement of Preventive Detention Law. Art. 22(7) cannot, however, avoid the operation of Art. 13 (1) but is subject to it.⁵⁴

Art. 22(7) allows Parliament to specify the circumstances and define classes in which a person may be detained under any pre-existing law for

49. A.I.R. 1950 Cal. 274 at 286.

50. *Ibid* at p. 280; *Brahmeswar Prasad v. The State*, A.I.R. 1950 Pat. 265 at 271.

51. *Narayanaswami v. Inspector of Police*, A.I.R. 1949 M. 307; *Keshavan v. State of Bombay*, A.I.R. 1951 S.C. 128; 6 D.L.R. 97 (S.C.).

52. *Brij Bushan v. State*, A.I.R. 1950 S.C. 129 at 130; 5 D.L.R. 48 (S.C.).

53. *Inderdeo Singh v. The State*, 1951 Pat. 242; *Ramesh Thappar v. State*, A.I.R. 1950 S.C. 124; 5 D.L.R. 42 (S.C.).

54. *Brahmeswar Prasad v. The State*, A.I.R. 1950 Pat. 265.

preventive detention but without those limitations imposed by Art. 22(4). There is, however, no authority for making a new detention law that can stand by itself. Any preventive detention law in conflict with Art. 22 is *void*.⁵⁵ Preventive detention is with reference to the apprehension of a wrong while punitive and arbitrary detention connote the prior commission of an act.⁵⁶ The Preventive Detention Act should be strictly construed as too wide powers are extended to the executive under it and too much encroachment is made on personal liberty.⁵⁷ Mandatory provisions should be strictly followed; otherwise it will render the detention order illegal or *void*.⁵⁸

Since the Act was to expire on 31st December, 1954, and the need was felt that the Preventive Detention Act was necessary in the interests of the security of the State and the maintenance of public order, the Parliament of India by Act LI of 1954, extended the period of the Act up till 31st December, 1957.

The amending Act substitutes for sub-section (2) of Section 1 the following:—

"It extends to the whole of India except the State of Jammu and Kashmir."

Priorly sub-section (2) applied the Act partially to Jammu and Kashmir to the extent of only defence, foreign affairs or the security of India. The amendment was necessitated by the fact that there is a separate statute called the Jammu and Kashmir Preventive Detention Act enacted by the State Legislature (*vide* Appendix E).

In sub-section (3) of Section 1 the amending Act merely changes the date of cessation of the Act as 31st December, 1957, instead of 31st December, 1954. This has been further extended till 31st December, 1960, by the Amending Act of 1957.

The texts of the two amending Acts are given hereunder:

THE PREVENTIVE DETENTION (AMENDMENT) ACT (LI OF 1954).

24th December, 1954.

An Act further to amend the Preventive Detention Act, 1950.

BE it enacted by Parliament in the Fifth Year of the Republic of India as follows:—

1. *Short Title*.—This Act may be called the Preventive Detention (Amendment) Act, 1954.

2. *Amendment of Section 1, Act IV of 1950*.—In Section 1 of the Preventive Detention Act, 1950—

(a) for sub-section (2), the following sub-section shall be substituted, namely:—

55. *Sunil Kumar v. West Bengal Govt.*, A.I.R. 1950 Cal. 274.

56. *Lakhi Narayan Das v. Province of Bihar*, A.I.R. 1950 F.C. 59.

57. *Bakthawar Singh v. State*, A.I.R. 1951 Simla 157.

58. *Sadhu Ram v. Crown*, A.I.R. 1951 Pepsu 6.

"(2) It extends to the whole of India except the State of Jammu and Kashmir."

(b) in sub-section (3), for the figures '1954', the figures '1957' shall be substituted.

THE PREVENTIVE DETENTION (CONTINUANCE) ACT (LIV OF 1957)

An Act to continue the Preventive Detention Act 1950 for a further period.

BE it enacted by Parliament in the Eighth year of the Republic of India as follows:—

1. *Short Title.*—This Act may be called the Preventive Detention (Continuance) Act, 1957.

2. *Amendment of Section 1.*—In sub-section (3) of Section 1 of the Preventive Detention Act, 1950, for the figures and words "31st day of December, 1957", the figures, letters and words "31st day of December, 1960", shall be substituted.

CRITICAL REVIEW ON THE LAW OF PREVENTIVE DETENTION IN INDIA

It is the unique privilege of India that with the advent of independence she has managed to keep on the statute book, the Law of Preventive Detention. It appears to be nearly permanent though not declared so. The Law of Preventive Detention in its modern form owes its genesis to the First World War. In fact in one sense detention without trial is clearly reminiscent of the Spanish Inquisition. No country other than India has sought to retain this Law of Preventive Detention during peace time. It has been always admitted that detention without trial is a clear denial of the liberty of a citizen. Only in abnormal war times can the liberty of a citizen be curtailed by the application of detention laws. While so, how can we defend it as a peace-time measure in India? In other words, it looks as if we in India have continuously been in some kind of war-emergency, for the last ten years. How else can we justify this lawless law? The emergency is not external but internal possibilities of commotion, imminence of disturbance to maintenance of public order, public tranquillity or the security of India. Are conditions so bad in India? Is not the ordinary citizen in India law abiding? Why is the party in power fighting shy of abrogating the Law of Preventive Detention? These are the questions we wish to ponder over and examine.

The sorry episode of permanently keeping the statute in force by the backdoor method of annual statements in Parliament, some governmental explanation for the need for continuance of the Act, and finally getting the majority in Parliament to vote for the continuance—these indeed have become normal features of our citizenship rights.⁵⁹ Needless to add the majority party faces no political opposition worth the name. What it wills is law. The one political party which is well knit—the Congress—has been in power for over a decade. And *power corrupts*. The tendency to examine the other side of the picture is not felt to be necessary for the majority. And where many of this party have tasted power and often have succumbed to pitfalls, moral, social and economic, there is not that Gandhian giant to pull up the wrong-doers. The wrong continues, power gets corrupt and the desire to rule

59. See Author's new Supplement to his work, *The Law of Pre-*

ventive Detention: Published by the Madras Law Journal Office.

willy-nilly is paramount. The Rule of Law has therefore to be buttressed by the special authority of such detention laws. The Act of 1950 has been continued by another Act of 1954 and now by Act LIV of 1957, extending the life of the Act till 1960. Is it proper to have such continued retention of a law which strikes at the fundamentals of civil liberties? This is indeed hardly fair to the citizens of a Federal Democracy. It may even be better to tolerate a permanent statute with adequate judicial safeguards, limiting the period of detention and setting free a detenu after six months if no case can be registered against him under the ordinary law.

The theory of subjective satisfaction of the authority has been carried too far in the Detention Act practically throttling any judicial review on that aspect. It is placing a great premium on the administrators' integrity and capacity to assess correctly the need for such detention. The scope of subjective satisfaction should be narrowed to the utmost limit. It can be dealt properly only at Cabinet level on the lines disclosed in *Liveridge v. Anderson*.⁶⁰ To delegate this subjective-satisfaction-power to a lesser official or a district officer is preposterous. The suggestion is if the satisfaction is left solely to the Home Minister of a State personally he would be answerable at the bar of the Legislature. There should be no delegation of this power to any one below the rank of a Minister. Then again, the present Advisory Board, however best manned, appears somewhat as a "substantial solatium" and can in no manner be called a substitute for a Court of Law. We venture to suggest that the Board's function may as well be taken by a Judge of a High Court—call him an 'Advisory Judge', if you like. If the Board is reputed to be at high level, the reputation will in no way be minimised if the Judge of a High Court is specially appointed and before him, the Administration has to lay the papers and the detenu allowed a hearing in person. This will create public confidence. A Board is rather a secret affair and the States' interest will in no way be jeopardised if one sole High Court Judge takes the place of the Board. The proceedings before a High Court Judge will be considered sufficiently public and will offer the detenu an atmosphere wherein he will rightly feel that justice is "seeming to be done".

As the law stands now, a detenu has a fourfold right. He is to be informed of the grounds of detention as soon as may be. Next, he can make representation in answer thereto. Thirdly, he is entitled to a personal hearing before the Advisory Council. Lastly, he has to be informed of the order of confirmation or release by the Advisory Board's recommendation to the Government. The scope of judicial review emerging from these is indeed very limited. The Courts have insisted that the grounds served on the detenu shall not be vague or indefinite or be such that they are not susceptible of an explanation. In the absence of such grounds, the order of detention is *ultra vires*. Even if one of the grounds is defective, it renders the order nugatory. Here again, the provision in the Constitution enables the detaining authority to refrain from disclosing facts which such authority considers to be contrary to public interest to disclose. This practically renders the so-called safeguard illusory. Further, a second detention can always circumvent a discharge of the detenu by Court. The safeguard of Review by the Advisory Board is not an adequate one. It can hardly take the place of a judicial trial. To say that the Council is manned by a Judge of a High Court and two others qualified to be such Judges, is hardly a convincing safeguard. The procedure before the Council renders the whole thing useless. A mere reading of an accusation and an answer supple-

60. L.R. (1942) A.C. 206.

mented by any information that may be called for is hardly enough. It is a farce as it were. No Court can judge a person merely on pleadings. It requires evidence tested by the yardstick of cross-examination, aid by counsel and arguments on law and fact. But the Advisory Board dispenses justice merely on papers and what we may say hearsay. Thus the procedure prescribed in a detention case is contrary to all canons of "Natural Justice". Why should there be this discrimination in procedure as between punitive justice (before Court of law) and preventive justice (before the Advisory Board under the Preventive Detention Act)? The detenu's right of audience before the Board can hardly make up for representation by a lawyer. Exclusion of counsel excludes the only source of assistance to the Board to sift the materials on behalf of the detenu.

To confer on a State absolute dominion over all that man holds dear (personal liberty) is to confer arbitrary power on those who are masters for the time being. Despotism in any shape will only land the country in abject slavery. We echo the words of Mr. M. K. Nambiar:⁶¹ "Of what worth is the glorious Preamble of the Constitution which holds out justice, liberty, equality and fraternity as the guiding star of our Republic, if the Constitution, as interpreted, empowers the deprivation of liberty without conforming to the most elementary principles of natural justice? Without personal freedom free India cannot breed a race of free men." A nation raises itself not by the quantum of its Police Laws but the absence of it except to the barest minimum. There is no clear case for a general Law of Preventive Detention in India. May be, there are certain potential law-breakers, but they can be dealt with under the ordinary law. The tendency appears to be that the majority political party in power, on account of its own inherent moral weakness, is unable to control the opposition in the political arena. The result is, there is a possibility of violence by the malcontents, not to speak of the contribution made in that field by the lesser fry of the party in power who foment needless bitter antagonism. The talisman, therefore, is the moral growth of the nation as a whole and of the major political party in power in particular.

We may in conclusion state that if at all the Law of Preventive Detention has to be retained on the statute book it may be confined to

(1) the defence of India, the relation of India with foreign powers, or the security of India;

(2) the maintenance of supplies and services essential to the community. The present other objectives such as security of State or the maintenance of public order may be altogether taken out of the statute book. Appropriate amendments in the above direction are called for both in Article 22 and the Preventive Detention Act. The safeguards attempted in clauses (4) to (7) of Article 22 are not real or adequate. In any event till the law is amended as here suggested the duty of the High Courts and the Supreme Court is indeed very onerous. On them lies the liberty of the citizen and the judiciary should be on the *qui vive* as sentinels of that liberty and strike down all invasions of the little constitutional protective freedom vouchsafed now in Article 22. It is for them to point out the defects in the law as they observe from typical instances and advise suitable legislative amendments.

61. See Introduction to the Author's Book *"The Law of Preventive*

Detention."

JAMMU AND KASHMIR PREVENTIVE DETENTION ACT, 2011.

An Act to provide for preventive detention in certain cases and for matters connected therewith.

Act IV of 2011.

Whereas circumstances exist which render it necessary in the interests of the security of the State or the maintenance of public order or the maintenance of the loyalty of and discipline among the Police forces and the maintenance of supplies and services essential to the community that provision should be made for preventive detention in certain cases and for matters connected therewith;

It is hereby enacted as follows:—

1. *Short title, extent and duration.*—(1) This Act may be called the Jammu and Kashmir Preventive Detention Act, 2011.

(2) It extends to the whole of the State of Jammu and Kashmir.

(3) It shall remain in force for a period of five years from the date of its commencement.

2. *Definitions.*—In this Act, unless there is anything repugnant in the subject or context, “detention order” means an order made under Section 3.

3. *Power to make orders detaining certain persons.*—(1) The Government may—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to

(i) the security of the State; or

(ii) the maintenance of public order; or

(iii) the maintenance of the loyalty of and discipline among the members of the Police forces of the State; or

(iv) the maintenance of supplies and services essential to the community; or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946 (XXXI of 1946) that with a view to regulating his continued presence in the State or with a view to making arrangements for his removal from the State; it is necessary so to do, make an order directing that such person be detained.

(2) Any of the following officers, namely:—

(a) District Magistrates,

(b) Additional District Magistrates, Sub-Divisional Magistrates, and

(c) any other officer or class of officers especially empowered in this behalf by the Government by a general or special order, may, if satisfied as provided in sub-clauses (ii), (iii) and (iv) of clause (a) of sub-section (1), exercise the powers conferred by the said sub-section.

(3) When an order is made under this section by an officer mentioned in sub-section (2) he shall forthwith report the fact to the Government together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter.

4. *Execution of detention orders.*—A detention order may be executed at any place in the State in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1989.

5. *Power to regulate place and conditions of detention.*—Every person in respect of whom a detention order has been made shall be liable—

(a) to be detained in such place and under such conditions including conditions as to maintenance, discipline and punishment for breaches of discipline, as the Government may by general or special order specify; and

(b) to be removed from one place of detention to another place of detention in the State by order of the Government or of any officer specially empowered by the Government in this behalf.

6. *Detention orders not to be invalid or inoperative on certain grounds.*—No detention order shall be invalid or inoperative merely by reason—

(a) that the person to be detained thereunder is outside the limit of the territorial jurisdiction of the officer making the order; or

(b) that the place of detention of such person is outside the said limits.

7. *Powers in relation to absconding persons.*—(1) If the Government or the officer specified in sub-section (2) of Section 3, as the case may be, has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed the Government or the officer may—

(a) make a report in writing of the fact to a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 87, 88 and 89 of the Code of Criminal Procedure, 1989, shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Government Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1989, every offence under clause b) of sub-section (1) shall be cognizable.

8. *Grounds of order of detention to be disclosed to persons affected by the order.*—(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the Government:

Provided that nothing contained in this sub-section shall apply to the case of any person detained with a view to preventing him from acting in

any manner prejudicial to the security of the State if the Government by order issued in this behalf declares that it would be against the public interest to communicate to him the grounds on which the detention order has been made.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

9. *Constitution of Advisory Boards.*—(1) The Government shall, whenever necessary, constitute one or more Advisory Boards for the purposes of this Act.

(2) Every such Board shall consist of three persons who are, or have been, or are qualified to be appointed by the Government.

(3) The Government shall appoint one of the members of the Advisory Board to be its Chairman.

10. *Reference to Advisory Boards.*—Subject to the provisions of Section 14, in every case where a detention order has been made under this Act, the Government shall within six weeks from the date of detention under the order, place before the Advisory Board constituted by it under Section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report made by such officer under sub-section (3) of Section 3.

11. *Procedure of Advisory Boards.*—(1) The Advisory Board shall after considering the materials placed before it and after calling for such further information as it may deem necessary from the Government or from any person called for the purpose, and if in any particular case it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person submit its report to the Government within ten weeks from the date of detention.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) Where there is a difference of opinion among the members forming the Advisory Board the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any manner connected with reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

12. *Action upon report of Advisory Board.*—(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such periods as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned,

the Government shall revoke the detention order and cause the person to be released forthwith.

13. *Maximum period of detention.*—(1) The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Section 12 shall be five years from the date of detention.

(2) Nothing contained in sub-section (1) shall affect the power of the Government to revoke or modify the detention order at any earlier time.

14. *Duration of detention in certain cases.*—(1) Notwithstanding anything contained in this Act, any person detained under a detention order made, in any of the following classes of cases or under any of the following circumstances, may be detained or continued in detention without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding five years, from the date of detention, namely, when such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(i) the security of the State;

(ii) the maintenance of public order.

(2) The case of every person detained under a detention order, to which the provisions of Section 21 of the General Clauses Act, 1977, a detention order may at any time be revoked or modified by the Government notwithstanding that the order has been made by any officer mentioned in sub-section (2) of section 3.

15. *Revocation of detention orders.*—(1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1977, a detention order may at any time be revoked or modified by the Government notwithstanding that the order has been made by any officer mentioned in sub-section (2) of Section 3.

(2) The revocation of a detention order or its annulment or its expiry shall not bar the making of a fresh detention order under section 3 against the same person—

(a) in any case where the Government or the officer as the case may be, is satisfied that the grounds on which the original order was made still exist and that it is necessary to detain the person again.

(b) in any case where fresh facts have arisen after the date of revocation or annulment or expiry on which the Government or the officer, as the case may be, is satisfied that such an order should be made.

16. *Temporary release of persons detained.*—(1) The Government may at any time direct that any person detained in pursuance of a detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may at any time cancel his release.

(2) In directing the release of any person under sub-section (1), the Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) Any person released under sub-section (1) shall surrender himself at the time and place and to the authority specified in the order directing his release or cancelling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years or with fine or with both.

(5) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof.

17. *Protection of action taken under the Act.*—No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done in pursuance of this Act.

18. *Repeal of certain existing laws.*—Sections 3 and 3-A of the Jammu and Kashmir Public Security Act, 2003 (XV of 2003) as amended by the Jammu and Kashmir Public Security (Second Amendment) Ordinance, 2010 (V of 2010), and clause (b) of sub-rule (1) and sub-rules (5), (5A) and (5B) of rule 24 of the Jammu and Kashmir Defence Rules, as continued in force by the Emergency Provisions (Continuance) Ordinance, 2003 (III of 2003), are hereby repealed.

19. *Savings with respect to existing orders of detention and special provisions therefor.*—(1) Notwithstanding the repeal of the laws mentioned in Section 18, every person under detention immediately before the commencement of this Act under an order of detention made or purporting to have been made under the provisions of any of the laws so repealed shall be deemed always to have been validly detained and shall continue to be detained for a period of six months from the date of commencement of this Act:

Provided that the Government may, after a further consideration of all the circumstances of the case in consultation with a person qualified to be appointed as a Judge of the High Court nominated in this behalf by the Government, direct that the order of detention in any such case shall continue in force notwithstanding that the said period of six months has expired, and the order as so extended shall continue in force for a further period of six months and thereafter, if and so often as it is again extended by a further similar direction made in the same manner:

Provided further that the maximum period for which any person may be detained in pursuance of any orders passed under this section shall be five years from the date of commencement of this Act.

(2) The provisions contained in Sections 5, 6, 15, 16 and 17 of this Act shall, so far as may be, apply in respect of any person whose detention is continued by reason of the provisions contained in this section as they apply in respect of any person detained in pursuance of a detention order made under Section 3; and save as otherwise provided in this sub-section, no other provision of this Act shall apply thereto.

Points from Leading cases under Jammu and Kashmir Preventive Detention Act IV of 2011.

I. *Ghulam Ahmed Ashai v. State*.⁶²

Though no form is prescribed under Sec. 3 the order of detention must show the subjective satisfaction of the authority about the necessity for detention and that he was duly authorised by the Government to pass the order. The said authority cannot delegate its powers without express powers under the statute to do so. The Deputy Secretary cannot sign for the Minister. The Act does not contravene Art. 20 of the Constitution. The court can see if the order is made under a valid law. Sec. 19 appears to limit the powers of the High Court in respect of those detentions to which S. 19 applies but it must be remembered that writs of *habeas corpus* can lie under the Constitution and also under S. 491, Cr. P. Code. So Sec. 19 cannot affect the power of the High Court to scrutinize orders of detention as to its legality and constitutionality. The Government can revoke a defective order and issue a fresh order which again is subject to the above tests.^{62a}

II. *P. L. Lakhanpal v. State of Jammu and Kashmir*.⁶³

A detenu under Sec. 3(1)(a)(i) is not entitled to know the grounds upon which he has been detained beyond what is actually disclosed in the order itself, where the Government has declared that it would be against public interest to communicate the grounds.

The effect of the modification in Art. 35 of the Constitution by the addition of Cl. (c) by the Constitution (Application to J. and K.) Order, 1954, is that such provisions of Act 4 of 2011 as are inconsistent with Part III of the Constitution shall be valid until five years after the commencement of the Order. As such Arts. 21 and 22 cannot at present be invoked to attack the constitutionality of S. 8 (1) of the Act. There is no provision which enjoins that the Prime Minister of Kashmir himself should sign the Order. Art. 370 (1) (c) and (d) legalises the addition of clause (c) to Art. 35 in so far as Jammu and Kashmir is concerned.

III. *Mohammad Subhan v. State*.⁶⁴

Clause (c) added to Art 35 is not in excess of the President's powers under Art. 370 (1) (d). Hence clause (1) of S. 8 of the 2011 Act by which the Government can withhold grounds on which the order of detention has been made is quite *intra vires* of the J. & K. Legislature's power, *vide* A.I.R. 1951 S.C. 332. In Art. 370 (1) (d) the word "exceptions" does not connote mere omissions and the President is authorised to do something more than "omit". The effect of Art. 35 (c) is to except the J. & K. Detention Act from the operation of Fundamental Rights. The word "modify" in Art. 370 enables the President to change and limit the operation of Art. 13. The order issued by the civil administration and not by Sadar-i-Riyasat is perfectly valid since Sec. 6 uses the words "superintendence, direction and control" which can only be done by the administration. If the procedure laid down under S. 4 is not followed the detention is invalid.^{64a}

IV. *Hussain-ud-Din Bandey and others v. The State*.⁶⁵

62. A.I.R. 1954 J. & K. 59 F.B.
62a. A.I.R. 1945 F.C. 18 and A.I.R. 1952 S.C. 106 relied on.

63. A.I.R. 1956 S.C. 197.

64. A.I.R. 1956 J. & K. 1 F.B.

64a. Relies on A.I.R. 1952 S.C. 106; A.I.R. 1954 J. & K. 59 distinguishing A.I.R. 1955 J. & K. 7 F.B.

65. A.I.R. 1955 J. & K. 7 F.B.

As Sec. 8 does not fix any time-limit for the supply of grounds to the detenu and if the detention is for security of State and the supply of grounds is delayed and given after the detenu resorted to a *habeas corpus* application, the order is not illegal.⁶⁶ Delay in supply of grounds is, however, undesirable. The Court must zealously guard civil liberty. So where there is even a flaw in the procedure, the order gets vitiated. Thus where in the order itself a direction is given that notice of the order should be given to the detenu and no copy of the order has been served at all on the detenu, the detention is *ultra vires*.

V. *Dwarka Das Bhatia v. State of J. & K.*⁶⁷

If the subjective satisfaction is based on numerous grounds, and some of them are found to be non-existent or irrelevant the subjective satisfaction is rendered illegal. If such an order is upheld it will amount to introducing the subjective satisfaction of the Court for the subjective satisfaction of the statutory authority under S. 3 (1). Defectiveness in unessential nature of the grounds is, however, not a good reason to set aside the order. A.I.R. 1953 S.C. 318; A.I.R. 1954 S.C. 176 explained where the ground stated that the detenu was engaged in unlawful smuggling relating to cloth, zari and mercury (the first two being essential articles), and as no material was placed before the Court that the smuggling attributed was substantially of mercury and that the smuggling of the other two commodities was in consequential nature, the order of detention was bad and consequently quashed.

VI. *Abdul Jabar Bud and Another v. State of J. & K.*⁶⁸

In *Keshav Nilkanth Jogelkar v. Commr. of Police* (A.I.R. 1957 S.C. 28) it has been observed that the word "forthwith" in Sec. 3 (3) of Act. IV of 1950 of India did not mean the same thing as "as soon as may be" in S. 7. The time granted to supply the grounds to the detenu was predicated by the expression "as soon as may be." The question of reasonableness of this "period" is related to the particular circumstances of the case. The proviso to S. 8 (1) has to be construed harmoniously with sub-section (1) to which it is a proviso. Hence the declaration contemplated in the proviso should be exercised before the expiry of the span of time predicated by the expression "as soon as may be" occurring in sub-section (1). When the detaining authority makes the order of detention it specifies in the Preamble the object or objects enumerated in S. 3 (1) (a). So if it is against the security of India, then at once the authority can act under the proviso to S. 8 (1) and state the impediment clearly preventing supply of grounds. In this view the failure to do so entails the quashing of the detention order.⁶⁹

66. Overruled in A.I.R. 1957 S.C. 281.

67. A.I.R. 1957 S.C. 164.

68. A.I.R. 1957 S.C. 281.

69. A.I.R. 1955 J. & K. 7 (F.B.)
overruled.

CHAPTER VI.

RIGHT AGAINST EXPLOITATION

Article 23.—“(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this Article shall prevent the state from imposing compulsory service for public purposes, and in imposing such service the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.”

FOREIGN CONSTITUTIONS

America (U.S.A.)

The Thirteenth Amendment declares:

Sec. 1.—“Neither slavery nor involuntary servitude except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2.—The Congress shall have power to enforce this article by appropriate Legislation.”

Burma

Art. 19 of the 1948 Constitution states:

“(1) Traffic in human beings and (2) forced labour in any form and involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall be prohibited.

Explanation.—Nothing in this section shall prevent the state from imposing compulsory service for public purposes without any discrimination on grounds of birth, race, religion or class.”

Japan

Article XVIII of the Japanese Constitution of 1946 states:

“No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime is prohibited.”

United Nations

Article 4 of the United Nations Declaration of Human Rights states:

“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms,”

Federal Republic of Germany

Article 12 enunciates:

"(1) All Germans have the right of free choice of occupation, place and employment and place of training. The pursuit of occupation may be regulated by legislation.

(2) No one shall be forced to do a particular job except in virtue of an established general obligation to perform a public service lying equally upon all.

(3) Forced labour is only permissible where a sentence of imprisonment is ordered by a court."

COMMENTARY ON FOREIGN CONSTITUTIONS

THE U. S. A.

The Thirteenth Amendment peremptorily prohibits slavery or involuntary servitude except as a punishment for a crime. The prohibition extends to both the State and Federal Governments. Section 2 of the Amendment gives Congress the power to enforce the prohibition by appropriate legislation. The power can be used to punish offending individuals, or individual, private person or State officials.

In *Clyatt v. United States*⁷⁰ the constitutionality of measures under the Thirteenth Amendment was upheld. The Act of Congress in 1867 prohibiting "peonage" or the voluntary or involuntary service or labour of any person in liquidation of his debt or obligation was upheld in the instant case.⁷⁰ "Peonage" is a Mexican term used to describe a condition whereby a debtor is compelled to work out for a creditor a debt or obligation due to the latter.

The American cases are clear⁷¹ that peonage is clearly involuntary servitude even though it arises under a private contract instead of by a statute yielding to the creditor the right to compel the performance of services if the debt is not paid or the obligation fulfilled when due.⁷² In *Gossard v. Crosby*⁷³ it was posited that to enjoin an employee from breaking his contract or employment and from leaving his employer contrary to the terms of the contract would obviously be reducing him to involuntary servitude and so would be in conflict with the purpose of the Thirteenth Amendment.

But mere trespasses or assaults or acts of intimidation which prevent one from making a contract which he otherwise would have made do not constitute slavery or involuntary servitude simply because those acts might legally have been in respect of slaves.⁷⁴ These cannot be controlled by the Thirteenth Amendment. In *Bailey v. Alabama*⁷⁵ it had been held that to make the breaking of a contract for personal service a crime is practically to coerce the contracting party to perform services amounting to involuntary servitude which is discountenanced by the Thirteenth Amendment. The learned judges have further opined that if a court were to give an injunction in favour of the employer ignoring the constitutional impropriety, a disobedience of it lands the party in contempt of court, while the obedience of it is against the Constitution.

"Involuntary servitude" is said to include any "control by which the personal service of one man is disposed of or served for another's benefit."

70. 197 U.S. 207.

71. Peonage Cases (1903) 123 Fed. 671.

72. *Bailey v. Alabama*, (1911) 219 U.S. 219.

73. (1906) 132 Ia. 155.

74. *Hodges v. United States*, (1906) 203 U.S. 1.

75. (1911) 210 U.S. 219.

76. *Ibid.*

But the following will not come under the above category such as regulation of servants in domestic relations,⁷⁷ compulsory military service⁷⁸ or compulsory work on the highway⁷⁹ which come under duties of citizenship, employment demanding special regulations such as seamen's agreements⁸⁰ and forced labour as a punishment for crime⁸¹ or as part of prison discipline⁸² or compulsory jury service.⁸³ Burdwick states,⁸⁴ "A parent is entitled to the services of his minor child and a master to the services of a child duly apprenticed to him during minority. . . . The Supreme Court has also declared that Federal legislation which provides for the return of deserting seamen and for criminal punishment of seamen for desertion does not contravene the Thirteenth Amendment."⁸⁵

In the Slaughter House cases⁸⁵ it was contended that the grant of exclusive slaughtering rights to a corporation and the consequent compulsion upon individuals to resort to that corporation for the slaughtering of livestock created a state of involuntary servitude. The court held, while admitting that the word "servitude" is of larger meaning than slavery, declined to extend that meaning so as to include the obligation of the citizen to conform to a requirement of law which is a legitimate exercise of the state's police powers.

The power to demand compulsory service on the military belongs to the Congress under Art. 1, Sec. 8 (12) of the U.S. Constitution "to raise and support armies".

England

There is no slavery in England. There is, however, the Crown's prerogative to "impress" seafaring men into the navy which was formerly exercised. At present such conscription requires legislative sanction. In common law the Crown's prerogative is exercised for conscription to all the forces in defence of the realm when there is sudden invasion or a formidable insurrection. During the last World War legislative sanction was accorded for conscription for the military service within as well as abroad. The National Service (Armed Forces) Act 1939, the Armed Forces (Conditions of Service) Act 1930, the National Service (Foreign Countries) Act 1942, are instances in point. In such abnormal times the civil law is suspended and martial law is proclaimed. In the words of the Duke of Wellington, "Martial law is neither more nor less than the will of the General who commands the Army, in fact no law at all". Martial law is invariably followed by an indemnity Act. . . . a tacit recognition of the suspension of all fundamental rights.

India.

Article 23 is very much on the same lines as Art. 19 of the Burmese Constitution. The Burman article goes further and clearly states that forced labour and involuntary servitude may be imposed as punishment for a criminal

77. *Chyatt v. U.S.*, (1905) 197 U.S. 207.

78. Selective Draft Law Cases (1918) 243 U.S. 366.

79. *Buttler v. Perry*, (1916) 240 U.S. 328.

80. *Robertson v. Baldwin*, (1897) 165 U.S. 275.

81. *U.S. v. Reynolds*, (1914) 235 U.S.

133.

82. *Ex parte Karstendick*, (1876) 93 U.S. 396.

83. *Buttler v. Perry*, (1916) 240 U.S. 328.

84. P. 500.

85. 16 Wallace 36, 21 L. Ed. 394 (1873).

offence. In regard to compulsory military service or conscription, the Constitution of India provides for it under the Legislative Entry 1 of List 1 which runs thus:

"Defence of India and every part thereof including preparations for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilization."

Forced Labour and 'Begar'.

The scope of clause (1) in Art. 23 extends not only to the prohibition of forced labour but also to the wider category "traffic in human beings". This term connotes not only "slavery" but also traffic in women for immoral or other purposes. This clause (1) is applicable to citizens as well as aliens.

"*Begar*" connotes involuntary work without payment, i.e., free service. Such free services sometimes obtain in some Zamindaries and estates as customary.

The words "other similar forms as forced labour" follow the word "*begar*". In *The State v. Jorawar*,⁸⁶ it was observed, "Art. 23 prohibits *begar* and other similar forced labour except for compulsory service for public purposes. Conscription for the defence of the country or for social services are possible instances of compulsory service for public services. That cannot, however, be said of imposition of compulsory service for the purpose of carrying a load of Government property by the Tahsildar or any Government servant in normal times." In the instant case the Chamba Paid Forced Labour Act (3 of 2004 B) was struck down as *ultra vires* of Art. 23 inasmuch as under Sec. 2 of the Act any adult male tiller of the soil or *malguzar*, who was not by notification or by reason of ill-health or otherwise exempt from rendering forced paid labour, wilfully refused to render it shall be liable to a fine not exceeding Rs. 20.

Under Art. 23 Cl. (i) the categories of traffic in human beings, *begar* and other forced labour if contravened shall be an "offence punishable in accordance with law." Such laws are invited to be made by the Constitution.

By Art. 35 Cl. (2) Parliament alone (not the Legislature of a State) shall have the power for prescribing punishment for acts declared to be offences under this part (Part III). There is a further mandatory duty on Parliament to make laws as soon as may be after the commencement of the Constitution prescribing punishment for the acts referred to in the sub-clause.

Thus the Bihar Harijan (Removal of Civil Disabilities) Act, 1949, declared it an offence to compel a Harijan to labour against his will or without wages or adequate wages. Similarly there are the U. P. Removal of Social Disabilities Act, 1947 (XIV of 1947) and similar Acts on the lines of the above in the other States also.

Where the work is entered on a contract though on low wages it cannot come under the category of "forced labour."⁸⁷

It may be noticed that Sec. 490, I.P.C., already stands repealed. It provided for breach of contract of service during a voyage of service and

86. A.I.R. 1953 H.P. 18.

A.I.R. 1952 Cal. 496.

87. *Dubar Goala v. Union of India*,

would be void as leading to forced labour in view of Art. 23. Sec. 491, I.P.C. is quite *intra vires* as it does not deal with forced labour.

Clause (2): Compulsory Service.

This is an exception to the prohibition contained in clause (1) on the ground of "public purpose". But nobody can be exempt from such conscription for public purposes solely on the ground of race, religion, caste or class. It must be noted that the word "sex" is not used. So there can be some discrimination on the ground of sex taking into consideration her fitness for the required conscripted public service.

In *Krygger v. Williams*⁸⁸ the High Court of Australia opined that the provisions of the Defence Act imposing obligations on all male inhabitants of the Commonwealth to undergo military training apply to all males irrespective of even conscientious objectors on the score of religion. Conscription cannot be evaded on the ground of religion.⁸⁹ Their Lordships opined in the instant case that "to require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds but it does not come within the provisions of Sec. 16 of the Constitution which provides that the Commonwealth shall not make any law for . . . prohibiting hint from a free exercise of religion."

To quote M. Reynolds, J., in *Butler v. Perry*⁹⁰ the Thirteen Amendment of the American Constitution "introduced no novel doctrine with respect to services always treated as exceptional and certainly was not intended to interdict the enforcement of those duties which individuals owe to State, such as services in the army, militia, on the jury etc. The great purpose in view was liberty under the protection of effective Government, not the destruction of the latter by depriving it of essential powers."

These observations hold good for India also. While in America the Thirteenth Amendment excepts compulsory labour for convicts sentenced to hard labour as punishment, in India there is no such provision. Obviously convict's labour is not of the *begar* description and so Art. 23 is no bar to such penal or punitive labour.

Public Purpose.

Conscription by the state could only be exercised for a public service which term would include conscription for military service or for any social service such as removal of illiteracy amongst the people. The obligation of the citizen to render military service in case of need and the right of a "just Government" to compel it is normally expected in any civilized state.⁹¹ There can be no higher public purpose than the defence of the state and as such it does not call for any compensation as is provided in Art. 31 (2) for compulsory acquisition of property. Moreover conscription for the army is imposed on all classes without discrimination. It is distinct in the sense it is a purpose which attracts the general interest of the community as opposed to the particular individual interest.⁹²

88. (1912) 15 C.L.R. 366.

89. *Murdock v. Pennsylvania*, (1943) 319 U.S. 105. In re *Summers* (1945) 325 U.S. 561.

90. (1916) 240 U.S. 328 (333): 60

Law Edn. 672.

91. *Selective Draft Law Cases* (1913) 245 U.S. 306.

92. *Framjee v. Secretary of State*, (1914) 39 Bom. 379 P.C.

Public purpose includes conscription to social services but this does not preclude the state from exempting certain persons on account of sex, physical disabilities, age or the like. Thus Sec. 4 of the East Punjab Agricultural Pests Diseases and Noxious Weeds Act, 1949, as amended by Act II of 1951 provides that in the event of such pest invasion all male members above 14 years resident in the district shall render all physical assistance. But exemption is made in favour of aged and infirm people or persons living far away.

Judicial Interpretation

In *Atma Ram v. State of Bihar*⁹³ Part III of the Bihar Finance Act, 1950, was impugned under Articles 14, 19 and 23 as the state had levied a tax on all passengers and goods carried by motor vehicles and "public carriers" at the rate of two annas in the rupee on all fares and freights payable to the owners of such vehicles and public carriers. The question was whether freedom of trade was restricted by any compulsory imposition on the citizen's right. Sarjoo Prasad, J., observed, "Now Article 23 (2) clearly makes an exception in favour of the state and enables the state to impose compulsory service for public purposes provided such an imposition is not vitiated on the grounds of discrimination. The legislature is entitled to impose burdens on citizens in the interests of the public. This is particularly so in the case of a taxing statute where the legislature has to levy taxes through the most convenient and efficient channels. In doing so, the state should be justified in imposing obligations upon the citizens concerned to assist in the collection of those taxes. The levying of a tax, that is to say, the determination that a given tax shall be imposed, assessed and collected in a certain manner is a legislative function, provided it is exercised within the permissible bounds of legislation as given in the Constitution." It was held that the duties levied on owners of motor vehicles were not justified or unwanted.

In *State v. Banwari*⁹⁴, it was held that Sec. 3 of the U. P. Removal of Social Disabilities Act XIV of 1947 is not *ultra vires* of Art. 23. Sec. 3 provided "that no person shall refuse to render to any person merely on the ground that he belongs to a Scheduled Caste, any service which such person already renders to other Hindus on the terms on which such service is rendered in the ordinary course of business." It was held that when a person was prohibited from refusing to render service merely on the ground that the person asking for it belongs to a Scheduled Caste, he was not thereby subjected to forced labour similar in form to *begar*.

In *Hamabai v. Secretary of State*⁹⁵ a lease and a sanad granted by the Government stipulated resumption at any time for "public purposes" upon certain terms as to notice and compensation. The Government resumed the sanad for building quarters for Government servants as suitable houses were not available. It was held that the scheme of the Government was one which would redound to public benefit by helping the Government to maintain the efficiency of its servants and that that was "a public purpose" within the meaning of contract contained in the lease and sanad.

In *Dubar Goala v. Union of India*⁹⁶ the facts show that licensed Railway porters entered into contract for doing extra work for at least two hours a day. They were paid some remuneration for their two hours' labour. Further

93. A.I.R. 1952 Pat. 349.

94. A.I.R. 1951 All. 615.

95. I.L.R. 39 Ban. 279 P.C.

96. A.I.R. 1952 Cal. 496; B.L.R. 1952 Cal. 234.

they got the benefit of a reduced license fee and in addition they were allowed the privilege of free user of the Railway premises for earning their livelihood. It was held that the porters could not be said to be doing *begar* or forced labour within the meaning of Art. 23 (1).⁹⁶ But it is possible to smell a kind of forced labour under colorable contracts at a nominal price which in no way may be commensurate with the amount of labour extracted.

A panchayat cannot force persons to perform labour. That will be *begar* forbidden by this Article.⁹⁷ But the custom in Manipur State according to which villagers rendered free service to their Chief only once a year for services rendered by him does not amount to any *begar*.⁹⁸

Where the owner of a house lets out the property to the defendant for the immoral purpose of running a brothel, the executors and trustees of the will of the owner, who were not in *pari delicto* or in *particeps criminis*, can sue to eject the defendant on the basis that the transfer is void under Sec. 6 (b) (2) of the Transfer of Property Act read with Art. 23 of the Constitution and Sec. 23 of the Contract Act.⁹⁹ Mr. Justice P. B. Mukerjee said in the instant case,⁹⁹ "Relief must be accorded to the trustees and executors of the will of the owner in such a case and we have to depart from the procedural convention of courts tragically misconceived very often as an inflexible rule of law and obey the still higher rules of public policy. . . ."

Article 24.—No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Prohibition of Employment of Children in Factories etc.

FOREIGN CONSTITUTIONS.

Czechoslovakia

Article 11 of the Constitution reads:

"(1) The State guarantees to children special care and protection and in particular, takes systematic measures to increase the population of the nation."

Article 29 states:

"(1) Every person possesses the right to public health. All citizens possess the right to medical care and to provisions in old age and also during incapacity for work and when unable to maintain themselves.

(2) Women are entitled to special care during pregnancy and maternity; and children and young persons are entitled to all facilities for full physical and mental development."

Germany

Article 18 of the German Democratic Republic states:

"(1) Youth is protected against exploitation and guarded against moral, physical and spiritual neglect. Child labour is prohibited."

97. *Chandra v. State of Raj.*, A.I.R. 1956 Raj. 188 (D.B.).

98. *Miksh v. State of Manipur*, A.I.R. 1956 Manipur 41.

99. *Pranballar Saha and another v. Sm. Tulsibala Dass and another*, A.I.R. 1958 Cal. 713.

Costa Rica

Section 51 of the Republic states:

"The family, as a natural element and foundation of society, shall be entitled to the special protection of the state. Mothers, children, the aged and helpless invalids shall likewise be entitled to this protection."

COMMENTARIES ON FOREIGN CONSTITUTIONS

The U.S.A.

Peculiarly enough there is no constitutional provision guaranteeing protection of children against hazardous employment. We have noted above the provisions in Czechoslovakia, Germany and Costa Rica giving special protection to children, guaranteeing conditions for their development and preventing their employment in any way that may be injurious to their physical development.

In America though there is no constitutional provision each state had originally its own standards as to child labour, the protection of women in industry, safety in mines and factories, workmen's compensation for accidents, etc. There was no uniformity and standards varied in each state. Sometimes in commerce, the disparity of these standards gave one state an advantage over another. This had a repercussion on the national trade as a whole. The greater part of the U.S.A. was prevented from having labour conditions it desired because a few states exploited child labour. The solution was found in the constitutional remedy available under the commerce clause. The authority of the Congress was ferretted to regulate the employment of children in industries engaged in inter-state commerce in *U.S. v. Darby Lumber Co.*¹ The Fair Standards Act of 1938 was in the instant case upheld as *intra vires* of the Constitution. This Act contained a provision excluding from inter-state commerce commodities in the production of which children under certain specified ages had worked. But in *Hammer v. Dagenhart*² it was held that the Federal statute could not operate against the police power of a State over a local trade and manufacture. Thus in the sphere of industries within a State and which are non-commercial in character there is no constitutional power to regulate the employment of children. Such regulation could only be effected under the commerce clause within the limited sphere of inter-state commerce.

International Labour Conventions do prohibit hazardous or injurious occupations to children and women. The American character of social guarantees^{2a} prohibited by Article 16 employment of children below 14 years, and fixed six hours of work per day for children below 16. Art. 17 forbade persons under 18 years in night work and work injurious to health.

India

We have in our Constitution a specific guarantee in respect of employment of children that in no circumstances should a child below 14 years be employed to work in (1) any factory, (2) or mine, (3) or engaged in any hazardous employment. Thus we have a clear position envisaged unlike the U.S.A.

1. (1941) 312 U.S. 100.
247 U.S. 251 (1918).

2a. Adopted at the 9th Conference

of American States in 1948. See also of U.N. Year Book of Human Rights, 1948, p. 448.

It is obvious Art. 24 does not prevent a child being employed outside the above three categories in any innocent or harmless job which is not hazardous. What is secured by Art. 24 is the health and safety of the child.

"Hazardous employment" must be construed by the rule of *ejusdem generis*, that is hazardous in the same manner as the foregoing "factory or mine" categories. Bus transport employment, bullock cart driving, vegetable vending, portering, etc. do not come under the prohibited categories.

The Employment of Children Act XXVI of 1938 clearly prohibits the employment of children below 15 years in any occupation (1) connected with the transport of passengers, goods or mails by railway, (2) involving handling of goods within the limits of any "port".

The Indian Factories (Amendment) Act, 1940, prohibits employment of children in unhealthy and dangerous surroundings and conditions.

Art. 39 (e) of the Directive Principles under our Constitution lays down that the state shall in particular direct its policy towards securing that the health and strength of workers, men and women and the tender age of children are not abused and that the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. It is high time that statute laws in our country fully carried out and implemented these directions.

Legislative Power.

The relevant entry is 24 of List III, Sch. VII. There is concurrent power to legislate in respect of "Welfare of labour including conditions of work, provident fund, employers' liability, workmen's compensation, etc." Sec. 67 of the Factories Act, 1948, prohibits child labour. There is similar provision in Sec. 45 of the Mines Act, 1952. But the word "child" is not defined in the Constitution or in the General Clauses Act. "Child" is different from the word "minor". The latter connotes less than 18 or 21 years of age. But in the Factories Act, Sec. 2 (c) defines child as one who has not completed fifteenth year. Article 24 prohibits a person below 14 years specifically from working in a factory or mine, etc.

CHAPTER VII

RIGHT TO FREEDOM OF RELIGION

Article 25.—(1) Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise, and propagate religion.

Freedom of Conscience and free Profession, Practice and Propagation of of Religion.

2. Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- (b) providing for social welfare and reforms or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation 1.—The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation 2.—In sub-clause (b) of clause (2) the reference to Hindus shall be construed as including a reference to persons professing, the Sikh, Jaina or Buddhist religion, and the reference to Hindu Religious institutions shall be construed accordingly.

FOREIGN CONSTITUTIONS.

The U.S.A. (America).

The First Amendment to the Constitution (1791) states :

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .”

Australia.

Sec. 116 of the Constitution Act reads :

“The Commonwealth shall not make any law for establishing religion or for imposing any religious observance or for prohibiting the free exercise of any religion and no religious tests shall be required as a qualification for any office or public trust under the Commonwealth.”

Japan

Article XX of the 1946 Constitution says :

“Freedom of religion is guaranteed to all . . . no person shall be compelled to take part in any religious act, celebration, rite or practice.”

Burma

Article 20 of the 1948 Constitution declares:

"All persons are equally entitled to freedom of conscience and the right freely to profess and practise religion subject to public order, morality or health and to the other provisions of this Chapter.

Explanation 1.—The above rule shall not include any economic, financial, political or other secular activities that may be associated with religious practice.

Explanation 2.—The Freedom guaranteed in this section shall not debar the State from enacting laws for the purpose of social welfare and reform."

But Art. 21 clauses (3) and (4) read thus :

- (3) "The State shall not impose any disabilities or make any discrimination on the ground of religious faith or belief.
- (4) "The abuse of religion for political purposes is forbidden and any act which is intended or likely to promote feelings of hatred, enmity or discord between racial or religious communities or sects is contrary to this Constitution and may be made punishable by law."

China

Article 13 of the Chinese Constitution states:

"The people shall have the freedom of religious belief."

Yugoslavia

Article 12 of the Constitution states:

"Liberty of religion and of conscience shall be guaranteed. All recognized religions shall be equal before law and may be practised in public."

Switzerland

Article 49 of the Swiss Constitution lays down:

"Liberty of conscience and creed is inviolable. No person may be compelled to become a member of any religious association; submit to any religious instruction; perform any act of religion; or incur any penalties, of any kind whatsoever by reason of his religious opinions. . . . The exercise of civil or political rights may not be limited by any ecclesiastical or religious requirements or conditions of any kind whatsoever."

Art. 50 further says that the free exercise of religion is guaranteed within limits compatible with public order and morality.

Eire

Article 44 (2) of the 1937 Constitution states:

1. "Freedom of conscience and the free profession and practice of religion are subject to public order and morality guaranteed to every citizen.
2. The State guarantees not to endow any religion.
3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."

The U.S.S.R.

Article 124 of the Soviet Constitution (1936) states:

"In order to ensure to citizens freedom of conscience the Church in the U.S.S.R. is separated from the State and the School from the Church."

Freedom of religious worship and freedom of anti-religious propaganda are recognized for all citizens.

Fourth French Republic

The Preamble of the 1946 Constitution in which is included Cl. (10) of the Declaration of Rights of 1789 states:

"No one ought to be disturbed on account of his opinion, even religious, provided their manifestation does not derange the public order established by law."

Ceylon

Sec. 29 (2) of the Ceylon (Constitution) Order in Council 1946 provides—

"No such law (*i.e.* made by Parliament) shall

- (a) prohibit or restrict the free exercise of any religion, or
- (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable,
- (c) confer on any persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions."

Rumania

Sec. 27 of Constitution of the Republic (1948) says:

Freedom of conscience and religion are guaranteed by the State.

The different religions may be freely organized and practised if their ritual and practices are not contrary to the Constitution, public safety or good morals.

No religious denomination, congregation or community has the right to open or maintain institutions for general education but only special schools for training the necessary ecclesiastical personnel under the State control.

The Rumanian Orthodox Church is autocephalous and unitary in its organization.

The organization and functioning of the different religious denominations shall be regulated by law.

Czechoslovakia

Articles 15-17 of the Republican Constitution provides for freedom of conscience and religious persuasion.

Article 15.

- (1) Freedom of conscience is guaranteed.
- (2) No person shall suffer prejudice by reason of his view of the world, faith or convictions though they cannot be adduced by

any person as grounds for refusing to fulfil a civil obligation under the law.

Article 16.

- (1) Every person has the right to profess in private and in public any religious creed or to be without religious persuasion.
- (2) All religious persuasions and persons of no religious persuasion are equal before the law.

Article 17.

- (1) Every person is free to perform the acts connected with any religious persuasion or the absence of religious persuasion. This right shall not, however, be exercised in a manner contrary to public order and morality. It shall not be permitted to be misused for non-religious ends.
- (2) No person shall be constrained by direct or indirect means to take part in such acts.

Germany

Sec. 4 of the Federal Republican Law states:

(1) Freedom of faith and conscience and freedom of religious and ideological profession are inviolable.

(2) The undisturbed practice of religion is guaranteed.

(3) No one shall be forced to serve in war as a combatant against his conscience. The detailed rules shall be prescribed by federal legislation.

The 1949 German Democratic Republican Constitution in Sections 40 and 41 stipulates:

Sec. 40. (1) Religious instruction shall be a matter for the religious societies. The exercise of this right is guaranteed.

Sec. 41. (1) Every citizen enjoys full liberty of faith and conscience. The unhindered practice of religion is protected by the Republic.

(2) Institutions belonging to religious societies, religious acts and religious instruction shall not be misused for unconstitutional objects or in the interests of a political party. This provision does not affect the right of religious societies to adopt a given attitude on vital national questions according to their view.

Sections 42 to 48 deal further with religions and religious societies.

Hungary

Sec. 54 of the Act of 1949 of the People's Republic states:

(1) The Hungarian People's Republic safeguards the liberty of conscience of all citizens and freedom of religious worship.

(2) In order to ensure liberty of conscience the Hungarian People's Republic separates the Church from the State.

Costa Rica.

The 1948 Constitution of the Republic states in Section 76:

The Roman Catholic Apostolic Religion is the religion of the State which contributes to its maintenance without impeding the free exercise in the Republic of other forms of worship not contrary to universal morality and good behaviour.

United Nations.

Article 19 of the U.N. Declarations of Human Rights postulates:—

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

COMMENTARY ON FOREIGN CONSTITUTIONS.

The various analogous provisions in the Constitution of some selected nations chronicled above show how the modern state treats religion. All the constitutions clearly allow the practice of religion as a guaranteed freedom. The existence of Godhead is recognized though not positively asserted. Freedom to worship the Supreme Being in the citizen's own way or tradition is recognized. There is, however, a general limitation that such freedom to practice religion must be subject to morality, health and public order. The Costa Rica Constitution has adopted the Roman Catholic faith as the religion of the state and further adds that other forms of worship can also be freely exercised provided such forms are not against universal morality and good behaviour. Other constitutions do not declare adherence to any particular faith as a state religion. They are in the main secular states allowing general freedom to all in the practice of their respective faith. In some constitutions such as in Russia, the attempt is to distinctly separate the church from the state and the school from the church so as to allow freedom for exercising one's conscience. It is so in Hungary also. In Russia there is a distinct freedom to profess and practice religion as also the converse freedom to do anti-religious propaganda. Such a clear anti-religious freedom is not guaranteed in any other constitution. Atheism is vouchsafed in Russia as one of the Fundamental Freedoms even as religion is treated as a freedom. In India and in other countries the stress is on the latter. Atheism is not given any special place in any other constitution of the world except Russia. In Japan, it is clearly owned that there can be no compulsion to take part in any religious act, celebration, rite or practice. In Eire there is a promise that the state shall not make endowments for any religion. In Czechoslovakia persons who profess religion and those that do not profess any are all equal in the eye of law; only in Federal Republican Germany is there allowed a constitutional exception for conscription to war services on the ground of conscience. In India and other countries such a privilege is not given. In India, Burma and some other states the right of the state to regulate, or restrict any economic, political or other secular activity associated with religious practice is recognized specifically. In Rumania the church cannot maintain schools of general education but it can run schools for training the necessary ecclesiastical personnel under state control.

America.

While the First Amendment prohibits laws respecting an establishment or religion or the free exercise thereof clause 3 of Article VI provides that "no

religious test shall ever be required as a qualification to any office or public trust under the United States."

Extent of Restriction on the Freedom.

The extent of the word "prohibition" in the First Amendment was considered in *Reynolds v. United States*³ where it has been stated that the prohibition does not prevent the Congress from penalizing the commission of acts which, though justified by the tenets of a religious sect are socially or politically disturbing or are generally reprobated by the moral sense of civilized communities. In the instant case⁵ it was held that polygamy might be declared illegal and criminal though declared proper and even meritorious by the Mormon religion. In *Davies v. Beason*⁴ Field, J., opined, "The term religion has reference to one's views of his relations to the Creator and to the obligations they impose of reverence for His being and character and obedience to His will. It is often confounded with the cultus or forms of worship of a particular sect, but it is distinguishable from the latter. The First Amendment to the Constitution in declaring that the Congress shall make no laws respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to the latter and the duties they impose as may be approved by his judgment and conscience and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others and to prohibit legislation for the support of any religious tenets or modes of worship of any sect. With man's relations to his maker and the obligations he may think they may impose and the manner in which an expression shall be made by him of his beliefs on those subjects, no interference can be permitted, provided always the laws of society designed to secure its peace and prosperity and the morals of its people, are not interfered with."

Again after the Reynolds case quoted above, in *Mormon Church v. United States*⁵ the Mormons' persistence on their pretence that the practice of polygamy was a religious one was negated as not coming under the protection of the First Amendment and as a completely sophisticated plea. In *West Virginia State Board of Education v. Barnette*⁶, Black, J., and Douglas, J., observed, "No well-ordered society can leave to the individual an absolute right to make final decisions unassailable by the state as to everything they will or will not do. The First Amendment does not go so far. Religious faiths honestly held do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect societies as a whole from great and pressing imminent dangers or which without general prohibition may regulate, time, place or manner of religious activities."

In *People of the State of Illinois Exrel McCollum v. Board of Education*⁷ "a released time" programme of religious instruction in public schools was held unconstitutional. This consisted in extra classes by teachers selected by local groups to impart religious instruction to pupils whose parents had so elected. The Court held that this use of the public school system to aid any or all religious faiths was inconsistent with the freedom assured in the Fourteenth Amendment.

3. 98 U.S. 145.

4. See also *Davis v. Beason* (133 U.S. 333).

5. 136 U.S. 1.

6. 319 U.S. 624.

7. 333 U.S. 203.

The observations in *Everson v. Board of Education of Ewing*⁸ are of importance: "The establishment of religion clause of the First Amendment means at least this. Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. . . . No tax in any amount large or small can be levied to support any religious activities or institutions whatever they may be called or whatever form they may adopt to teach or practise religion. Neither a state nor the Federal Government can openly, or secretly participate in the affairs of any religious organisations or groups or *vice versa*."

Cooley⁹ interprets the prohibition against "establishment of religion" in the First Amendment thus:

"By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favours and advantages which are denied to others. It was never intended by the Constitution that the Government should be prohibited from recognizing religion or that religious worship should never be provided for in cases where a proper recognition of Divine providence in the working of the Government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations or sects."

In *New v. United States*¹⁰ it has been pointed out that "religious freedom does not secure to one the right to use the mails in a scheme to get money from others by professing the attainment of a supernatural state or self-immortality by righteous conduct enabling him to conquer disease, death, poverty and misery and to transmit the power to others."

Extent of the Freedom.

The extent of religious freedom obtaining in America can be adjudged in relation to the history of Jehovah's Witnesses who did religious propaganda by selling tracts, ringing door bells, by parades, distributing pamphlets, books, and phonographs. They are "God's faithful servants who go from house to house, to bring the message of the kingdom to those who reside there."¹¹ The Fourteenth Amendment which assures that no law shall abridge the privileges or immunities of citizens, or deprive any person of liberty or property without due process of law or deny equal protection of laws—was tested by the Jehovah cases. The freedoms guarding the liberty of a person include freedom of speech which includes also freedom of religion in the spoken sense. Hence legislation requiring a permit to distribute handbills was held not to apply to the Jehovah Witnesses offering their tracts as that would interfere with their freedom to propagate religion.¹² The fact that the handbills contained an advertisement of books for sale by the Witnesses did not deprive the distribution of its constitutional protection.¹³ Nor is prior approval necessary for the solicitation of money for the Witnesses' movement or orders for its books.^{14 15} It was also held¹⁶ that no licence tax should

8. 330 U.S. 1 (1947).

9. "Constitutional Law" (1931, 4th Edn.), p. 269.

10. (1817) 235 Fed. 710.

11. Quoted from Judge Rutherford's book "Religion" cited in *Murdock v. Pennsylvania*, 139 U.S. 105.

12. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v. New Jer-*

sey, 308 U.S. 147 (1939).

13. *Jamison v. Texas*, 318 U.S. 413.

14. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

15. *Largent v. Texas*, 318 U.S. 418 (1943).

16. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jones v. Opelika*, 319 U.S. 103 (1943).

be levied for street vendors of tracts and books as it would amount to a tax on religious canvassing or propaganda. Phonographs and "fighting words" in religious propaganda is allowed¹⁴ except that it should not become a menace to public peace and order.¹⁴ Religious parades, however, required a licence on the ground of conforming to municipal regulations to assure safety and convenience to the public using the highways.¹⁷ Door bells ringing by the Jehovah Witnesse for purpose of offering advertisement handbills and circulars was considered unobjectionable in *Martin v. Struther*,¹⁸ though Justice Jackson dissenting opined that it would amount to a menace of intrusion on privacy of the individual. The compulsory flag statute was considered unconstitutional in *West Virginia Board v. Barnette*¹⁹ in relation to conscientious objectors. In this case the Board of Education of the State resolved that every pupil in a school should salute the national flag on pain of expulsion and prosecution even of his parents or guardian. The Jehovah Witnesses relied on the exhortation in Exodus Ch. XX, 4 and 5, which stated, "Thou shall not make unto thee any graven image, or any likeness of anything that is in heaven above or that is on earth beneath or that is in the water and the earth; thou shall not bow down thyself to them, nor serve them." They felt that the flag was an image within this command and for this reason they refused to salute it. Justice Jackson held the refusal to salute the flag under such circumstances not illegal and that the resolution of the Board for expulsion and prosecution was unconstitutional. The learned Judge put it thus, "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. . . . The test of its (freedom's) substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star, in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or to force citizens to confess by word or act their faith therein. We think the action of the local authorities in compelling the flag salute and pledge, transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." This decision thus overruled the dictum laid down in *Minersville School District v. Gobitis*,²⁰ where under cover of the statutory power the school was to conduct courses for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism and increasing the knowledge of the organization and machinery of government. The Gobitis decision assumed that power exists in the state to impose the flag salute discipline upon school children in general. Though Lincoln posed the question, "Must a Government of necessity be too strong for the liberties of the people or too weak to maintain its own existence?" and the Gobitis case answered it in favour of strength, yet Justice Jackson²¹ held, "It may be doubted whether Mr. Lincoln would have thought that the strength of Government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from schools. . . . If vividly applied to this problem, the utterance cited would resolve every issue of power in favour of those in authority and would require us to override every liberty of thought to weaken or delay execution of their policies."

17. *Cox v. New Hampshire*, 312 U.S.

569,

18. 319 U.S. 141 (1943).

19. 319 U.S. 624.

20. 310 U.S. 586.

21. 319 U.S. 624.

In *Everson v. Board of Education*²² it was held though public money was expended by the Board towards transporting to and from schools including parochial school of Roman Catholic persuasion, it was like providing policemen to protect all children at crossings or like using the fire department to extinguish a fire in a church. But there is something to be said of the minority view of dissenting judges in that case that non-provision of such amenities to Protestant, Jewish or non-sectarian schools smacked of discrimination.

In *Hamilton v. Regents of the University of California*²³ certain Methodist students in the University had refused for reasons of conscience to take the military training course in R.O.T.C. and had therefore been informed by the Regents that they would be excluded from the University so long as they continued in their refusal. The court held that the Fourteenth Amendment did not confer a right to attend a state University free from the obligation of students to take the course in military training. "The conscientious objector if his liberties were to be thus extended might refuse to contribute taxes in furtherance of war, whether for attack or for defence, or in furtherance of any other end condemned by his conscience as irreligious or immoral." The right of private judgment has never yet been so exalted above the powers and the compulsions of the agencies of Government.

A piquant decision arose in *In re Summers*²⁴ where a highminded applicant for admission to the Illinois Bar was excluded for want of a certificate from the committee on character and fitness. The applicant was a believer in the Sermon on the Mount and was opposed to the use of force not only in war but also by police action to enforce the law. The court held that the Fourteenth Amendment did not secure the conscientious objector against such state action. It may, however, be doubted if it was a correct decision to debar Mr. Summers from the practice of law. Such men of high objectives may be an ornament to the Bar.

It is the law to deny citizenship to a person who refuses to swear to bear arms in the defence of the country. But in *Giroward v. U.S.*²⁵ the Court struck new ground. Giroward, a Seventh Day Adventist from Canada, applied for naturalization. When asked the usual statutory query, "If necessary, are you willing to take up arms in defence of the country?" he replied "No" but he was willing to serve in the army in a non-combatant role but would not bear arms in any event. The court granted him the citizenship observing, "The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril . . . nurses, engineers, litter bearers, doctors, chaplains—these too made essential contributions." The case of Giroward in a way overrules *In re Summers* and the earlier case *Macintosh v. U.S.*²⁶ In the latter case a professor of Theology at Yale who was also a chaplain in the Canadian Army during the First World War, was refused citizenship as he refused to take vow to bear arms.

Nature of the Freedom of Religion.

The "free exercise of religion" includes freedom of religious belief, freedom of practice and freedom of propaganda in religious views. It used to

22. 330 U.S. 1 (1947).

23. 293 U.S. 245 (1934).

24. 325 U.S. 561 (1945).

25. (1946) 329 U.S. 61.

26. (1931) 283 U.S. 605.

be said that Frederick the Great opined that "every man should be allowed to go to Heaven in his own way. Worshipping God should be according to the dictates of one's own conscience."²⁷ It is left to the individual and is never the concern of the state. Man is not answerable to the state for the "verity of his religious views."²⁸ The right of worship was granted to God for man to worship as he pleased. There can be no compulsion in law of any creed or practice of any form of worship.²⁹

While the freedom of religious belief is unfettered the freedom to practice it is limited by factors such as morals, public order or health.³⁰ It is subject to the criminal laws, health laws and punitive provisions of those statutes.³⁰ Legislation and regulations which compel vaccination, isolation, even against persons who believe in faith cure are *intra vires*.³¹

We have already stated how polygamy cannot be permitted against statute on the score of religion,³² and how supernatural powers cannot be advertised through the post office to secure money.³³ But if the state interferes with religious freedom it should be in the interest of the protection of the community against some "clear and present danger"³⁴.

Freedom to propagate religious view is limited by considerations of preservation of public order, safety and moral laws. There can be no tax on such right.³⁵ Though propaganda cannot intrude into the privacy of houses³⁶ it can be done on the highways subject to Municipal regulation³⁷. Purveying of tracts cannot be subject to a permit³⁸ or a licence tax.³⁹

In a recent case⁴⁰ it has been posited that there can be no statute transferring control of church from one body to another rival body, on the ground that the existing governing body was under subversive influences. Such statute violates the First and Fourth Amendments. The guarantee of religious freedom is affected even though the legislature reasonably believed that such statute would free the church from atheistic or subversive influences.

Australia.

Section 116 of the Constitution provides the guarantee against any law being enacted prohibiting the "free exercise of any religion." This means "prohibiting practice of religion or the doing of acts which are done in the practice of religion." In *Judd v. McKeen*⁴¹ Higgins, J., observed: "If abstention from voting were part of the elector's religious duty . . . this would be a valid and sufficient reason for his failure to vote." In other words, religious objections in view of Sec. 116 may be regarded as valid for purposes of Sec. 128 of the Electoral Act 1918-25 raised in the instant case. In *Krygger*

27. *Downes v. Bidwell*, (1901) 182 U.S. 244.

28. *U.S. v. Ballard*, (1944) 322 U.S. 78.

29. *Cantwell v. Connecticut*, (1939) 310 U.S. 296.

30. *Davies v. Bason*, (1890) 133 U.S. 33.

31. *People v. Pearson* (1905) 175 N.Y. 201.

32. *Reynolds v. United States*, (1878) 98 U.S. 145.

33. *New v. U.S.*, (1917) 245 Fed. 710.

34. *Schenck v. United States*, (1919)

249 U.S. 47.

35. *Murdock v. Pennsylvania*, (1943) 319 U.S. 105.

36. *Martin v. Struthers*, (1943) 319 U.S. 141.

37. *Marsh v. Alabama*, (1945) 326 U.S. 501.

38. *Cantwell v. Connecticut*, (1940) 310 U.S. 296.

39. *Coleman v. Griffin*, (1938) U.S. 414.

40. *John Kodroff v. Saint Nicholas, A.I.R.*, N.U.C. 1960: 97 Law Ed. 120: 344 U.S. 94.

41. (1926) 38 C.L.R. 380.

v. Williams,⁴² Griffith, J. and Barton, J., dismissed an appeal against a conviction under the Defence Act, 1903-1911 for refusal to attend compulsory military training on the score of religious belief. The doing of drill had nothing to do with the practice of religion which alone is safeguarded in Sec. 116. In *Adelaide Company of Jehovah's Witnesses Incorporated v. Commonwealth*⁴³, the plaintiff claimed the hall as their Association premises, which the Commonwealth seized under the National Security (Subversive Associations) Regulations on the plea that their religious preachings affected efficient recruitment to the prosecution of the war. The plaintiff's plea that the regulations were invalid as offending Sec. 116 was turned down as such principles and doctrines of anti-war recruitment for war service was not really "religion" but subversive activities under the cloak of religion. But the plaintiff succeeded on the ground that the determination of subversive activities was not a defence power and that certain of the regulations were invalid as they attempted to confer judicial powers on executive officers who are ineligible to exercise such power under Sec. 71 of the Constitution.

The Australian law was discussed in a recent Indian decision. In *Lakshmindra Teertha Swamiar v. H.R.E. Madras*⁴⁴ their Lordships of the Madras High Court canvassed the Australian law thus: "In the Australian Constitution it has been held that notwithstanding the absolute nature of the prohibition in Sec. 116 preventing the Commonwealth from making any law for establishing any religion etc., it is open to the court to consider and determine whether the freedom of religion has been unduly infringed by a particular legislative provision. In justification of this view, the decisions of the American courts, already cited, were relied on. Without such restrictions it might lead to anarchy and make it difficult, if not impossible, to maintain the rule of law. . . . The judgment of Latham, J., in *Adelaide Company's case* contains a useful and illuminating discussion of the ambit of religious liberty.

The judge states, 'Almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies not only in religious worship but in the everyday life of the individual—all these may become part of religion. Once upon a time all the operations of agriculture were controlled by religious precepts. . . . Many religions involve the idea of sacrifice. . . . Polygamy has been part of the Mormon religion. . . . The thugs of India regarded it as a religious duty to rob and kill. The practice of 'suttee' involving the immolation of the widow upon the funeral pyre of her husband, was for centuries a part of the Hindu religion.' Hence the need is vividly clear for the regulation of such exotic practices of religion.

England.

In England the freedom of the exercise of religion is included in the freedom of speech, freedom of association, and the freedom of public meeting. The Salvation Army which organized processions in the streets as propaganda was in 1882 unpopular and it attracted stone-throwing at it by rival group called "The Skeleton Army". There was then a prohibitory order against the procession which was disobeyed. The leaders arrested preferred an appeal in *Beatty v. Gibbanke*⁴⁵ and the appeal was allowed. The court observed, "What happened here is that an unlawful organization has assumed to itself

42. (1912) 15 C.L.R. 366.

43. (1943) 67 C.L.R. 116 (H.C.).

44. A.I.R. 1952 Mad. 613.

45. (1882) 9 Q.B.D. 308.

the right to prevent the appellants and others from lawfully assembling together and the finding of the Justices amounts to this that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition."

The Church of England is established by law and is an essential part of the state. The Sovereign is the supreme governor of the Realm in all matters spiritual and temporal. The clergymen are governed by statutes. The law of the church is part of the law of the land and courts take judicial notice of it.

But a British citizen need not necessarily be a member of the Church of England. He, as indeed any person living in England, is entitled to profess and practise any religion according to his own belief. But the law of England punishes blasphemy. It prohibits the vilification of Christian religion but serious discussion is permitted if it is meant to be real, though there is a denial of God's existence or of Jesus Christ. Blasphemy is an indictable misdemeanour punishable by fine or imprisonment, at Common Law, [under 1 Edw. VI C I]. Persons reviling the sacrament of the Lord's Supper by contemptuous words are to suffer imprisonment.

Disputes between learned men upon controversial points is permitted. Raymond, C.J., stated in *R. v. Woolston Fitzgibbon*,⁴⁶ "We do not meddle with any difference of opinion and we interpose only when the very root of Christianity itself is struck at". In *R. v. Ramsay*,⁴⁷ Coleridge, L.C., observed, "I have no doubt that mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy. . . . Parliament has altered the law as to religion. It is no longer the law that none but believers in Christianity can hold office in the state. . . . If the decencies of controversy are observed even the fundamentals of religions may be attacked without the writer being guilty of blasphemy." But branding Jesus as an imposter, a murderer in principle and a fanatic is blasphemy.⁴⁸ Truth of attack on Christianity is no defence.

So airing of religious views in England is subject to the standards of decency and public morals. To attack religion is not a permissible freedom in England if it comes under the ambit of the law punishing blasphemy.

India.

In India the ancient connection between Law and Dharma had never been controverted. Dharma contained the moral doctrines drawn out from experiences in religion and law of the land was generally set in that background. The existence of God had always been recognized by the state in India from historical times. The concept of a secular state is also not new since from ancient times the Hindu king administered justice equally between all citizens whatever be his religious persuasion. We have not heard of religious persecution in India. The king's Dharma in India always allowed free exercise of the various religious persuasions. A secular state was never considered as an atheistic state. It was left to the individual's conscience. The state can have no religion of its own and should treat all religions as equal in the eye of law. State patronage could not extend to any particular religion nor could anyone be compelled to practise any religion against his conscience or belief.

⁴⁶ See also *R. v. Marycarlisle*, (1821) 1 St. Tr. N.S. 1033.

⁴⁷ *R. v. Ramsay*, 13 Cox. 231.

⁴⁸ *R. v. Waddington*, 2 B and C 26.

It would appear that Eire recognises the special position of the Holy Catholic Apostolic and Roman Church [Art. 44 (1) 2] while in the U.S.A., "the Christian religion was always recognized in the administration of the common law."⁴⁹ In Burma [Art. 21 (1)] the special position of Buddhism is recognized. But it will be demonstratively seen that in the Indian Constitution there is no such state patronage extended to any one religion. In this sense we can say that India is more secular than even America, Eire or Burma.

Article 25 Clause (1).

Under Art. 25 (1) the guaranteed freedom is subject to (a) public order, (b) morality and (c), health and (d) other guarantees in Part III of the Constitution. The freedom thus guaranteed are (a) freedom of conscience (b), the right freely to profess, practise and propagate religion. But this is subject to Art. 25 (2) which provides that the state is empowered nevertheless—

- (a) to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice;
- (b) to provide for social welfare and reform or, to throw open Hindu religious institutions of a public character to all classes and sections of Hindus.

The wearing of Kirpans by the Sikhs is declared to be included in the profession of the Sikh religion. It is further declared that the terms "Hindus" and "Hindu religious institutions" include Sikhs, Jains or Bhuddhist and their respective religious institutions.

The freedom of conscience is the absolute inner freedom of the citizen to mould his own relation with God in whatever manner he pleases. When this freedom becomes articulate and expressed in outward form it is "to profess and practise religion." The right to exercise this freedom, namely, "to profess and practise" is done in the public sphere which is guaranteed to be allowed to be done without any hindrance or interference so long as the party does so without offending the rules of morality, health and public order.

To Propagate.

This term connotes the freedom to act in the exercise of one's religious belief without any hindrance subject to equal rights of others and to the maintenance of public order. It is ancient history from time immemorial that the attempt to persuade, convert the other man to one's own faith always existed so as to keep aloft the country's spiritual values and heritage. But the word "propagate" only indicates "persuasion and exposition" without any element of coercion. Any militant drive to convert or to make aggressive proselytizing speeches, vilifying the other man's religion, coercing to convert do not come under the category of "to propagate" and such rights are not at all guaranteed by the state. The guarantee is only to propagate one's belief and not to do propaganda vilifying the other man's belief. The latter attempt would certainly endanger public order and public morals, not to mention the jeopardy it causes to the exercise and practice of the other man's religion. It must be understood clearly that India being a land of many religions the limits of "propagation" should be clearly understood. Militant

49. See Cooley, 'Constitutional Law', pp. 250-60.

conversion or low, vulgar and vilifying propaganda in proselytization will only lead to disastrous consequences leading to public disorder and disharmony. The Christian church organization, the Muslim organization and also the Arya Samaj of the Hindus, all of which indulged in conversions, will do well to recognize these limits.

The term "profession of religion" only means the right of a person who believes in a religion to state his creed. The practice of religion is the practical expression of his belief in respect of the manner of private or public worship.⁵⁰ The expression "subject to other provisions of this" would mean there can be no Fundamental Right of the practice of religion which offends another fundamental right such as *vide* Art. 17 regarding untouchability and Art. 23 regarding traffic in human beings (devadasis) and also avoiding conscripted military service on the score of religion.

'Religion', 'Conscience' and 'Practice of Religion'.

The words "subject to public order, morality and health" in Art. 25 (1) cannot have anything to do with freedom of conscience. Hence short of the former, there can possibly be no state control in matters of conscience. So "religious beliefs" and practices flowing from it are not capable of any state control except where they run counter to public order, morality or health. As Chagla, C.J., observed in a Bombay case,⁵¹ "Now a sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the state has embarked, then the religious practices must give way before the good of the people of the state as a whole."

The connotation of religion and "conscience" has been well brought out in *Ratilal v. State of Bombay*⁵² where Chagla, C.J., observed thus:

"Religion as used in Articles 25 and 26 must be construed in its strict and etymological sense. Religion is that which binds a man with his Creator. . . . Even when you have a religion which does not believe in a Creator, every religion must believe in a conscience and it must believe in ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral and ethical principles regulates the lives of men, that alone can constitute religion as understood in the Constitution. A religion may have many secular activities, it may have secular aspects, but these secular activities and aspects do not constitute religion as understood by the Constitution. There are religions which bring under their own cloak every human activity. There is nothing which a man can do, whether in the way of clothes, or food or drink which is not considered a religious activity. But it would be absurd to suggest that a Constitution for a secular state ever intended that every human and mundane activity was to be protected under the guise of religion."

So it is but proper that all practices which offend health, morals or public order can be interfered with by the state. As Shah, J., has put it in the instant case, religion has not been defined either in the Constitution

50. *Srinivasa v. Saraswathy*, A.I.R. 1932 Mad. 193.

51. *State of Bombay v. Narasu*

Appa A.I.R. 1952 Bom. 84.
52. A.I.R. 1953 Bom. 242.

or in the General Clauses Act. "Essentially religion is a matter of personal faith and belief or personal relation of an individual with what he regards as his maker or his Creator or the Higher Agency which he believes regulates the existence of sentient beings and the forces of universe."

To quote Chief Justice Wait of the Supreme Court of America,⁵³ "Laws are made for the government of actions and while they cannot interfere with mere religious belief and opinions, they may with practices."

But there can be no interference with the practice of religion by the state authorities except within the ambit stipulated in Art. 25, namely, in so far as they affect public health, morals, or public order. So in the Madras Hindu Religious and Charitable Endowments Act 19 of 1951, Sections 21, 23, 24 and 54 were struck down as they contained large powers vested in the Commissioner, calculated to interfere with the practice of religion, i.e., in the worship and propagation of religion.⁵⁴ But subjects as marriage, divorce, adoption, joint family, partition etc. are listed in the Concurrent List, Entry 5 of List III and as the basis of classification is not religion, any legislation on these subjects cannot be treated as affecting the freedom of religion.⁵⁵ Similarly, prohibition of polygamy is not *ultra vires* as it is not a practice based on religion.⁵⁶ Any law that introduces social reform cannot also be questioned as violating the right freely to profess, practise and propagate religion.⁵⁷ So a law compelling monogamy and prohibiting bigamy and polygamy will be valid as promoting social welfare in a democratic welfare state.⁵⁸

To practice or propagate subject to public order, morality and health etc.

The overriding importance of public order, morality and health is recognized in Art. 25 (1). Thus in the name of religion no act should be indulged in so as to attract the above categories. When these three categories are attracted the control of the state in these spheres come in. Thus we have in statutory enactments a provision like the one in Section 34 of the Police Act, 1861, prohibiting the slaughter of cattle or indecent exposure of one's person on any road, thoroughfare or other public place; these acts cannot be justified on the plea of practice of religious rites. It has also to be stated that Art. 25 (1) specifies that the exercise of the right under Art. 25 should not clash with the exercise of the other freedoms set out in Part II of the Constitution, such as "ban of untouchability" (Art. 17) or traffic in human beings (Art. 23). In the name of religion "untouchability" or "traffic in human beings, e.g., system of Devadasis" cannot be tolerated. Nor can a citizen avoid "service for public grounds" on the ground of religion as Art. 20 (2) is a bar to such escape from compulsory service or compulsory military training for defence.

But this practice of religion would allow only practice of the essence of religion and not political doctrines associated with creeds which could not be the essence of religion. Anti-war propaganda under the guise of religion

53. (1879) 25 Law Edn. 244, 98 U.S. 145.

54. *Lakshmi Thirtha Swamiar v. Commr., H.R.E. Board, Madras*, A.I.R. 1952 Mad. 613.

55. *Srinivasa Ayyar v. Saraswathy Ammal*, A.I.R. 1952 Mad. 193.

56. *State of Bombay v. Narasu Appa*, A.I.R. 1952 Bom. 84.

57. *Surya Pal Singh v. U.P. Government*, A.I.R. 1951 All. 674.

58. *State of Bombay v. Narasu Appa*, A.I.R. 1952 Bom. 84.

is taboo especially when the nation is at war.⁵⁹ The liberty of religion can only be subject to restraint and regulation reasonable in relation to the subject and adopted in the interests of the community at large. Liberty, as stated in an American case,⁶⁰ "only implies the absence of arbitrary restraint, immunity from reasonable regulations and prohibitions in the interests of the community."

Thus the freedom of religion does not include a right to do inhuman acts such as "human sacrifice" in the name of religion. "Crime is not the less odious because sanctioned by what any particular sect may designate as religion."⁶¹ The form or culture of worship of a particular sect is not the essence of religion which connotes only "one's views of his relations with his Creator."⁶¹ It was further stressed in the instant case,⁶¹ "The First Amendment of the Constitution in declaring that the Congress make no law respecting the establishment of religion or forbidding the free exercise thereof was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. . . . However free the exercise of religion may be, he must be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

The term '*Public Order*' is scheduled out in Entry 1 List II Sch. VII. It implies absence of violence and an orderly state of affairs. Anything which disturbs public tranquillity disturbs public order.⁶² Prevention of communal disturbances come within "public order."⁶³ "Arms" is a Federal subject (Entry 8 List 1), yet for preventing communal disturbances, the use of arms by the public can be curtailed by the State Legislature⁶⁴ under the caption "public order." The entry "public order" also includes "public safety."⁶⁵

Sec. 35 of the Police Act, 1861 prohibits the slaughter of cattle, or indecent exposure of one's person on any road, thoroughfare or other public place. There can be no justification for such acts on the score of religion as these certainly offend public morality, health, and even public order. The freedom of religious belief and to act in the exercise of such belief can never override the interests of peace, order, or morals of a society. It is open to anyone to organize religious associations and through them propagate the tenets of his religion. A journal also may be run on this account but a line must be drawn to see that such activities do not touch the rights, liberties and safety of other subjects of the state nor affect public order, morality or health. The moment there is such a transgression the police power of the state steps in to interfere. Liberty of religion only means the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions in the interests of the community.

59. *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116.

60. *Chicago B. & Q. R. Co., v. Mcguire*, 219 U.S. 549.

61. *Davies v. Byson*, (1890) 133 U.S. 333. *Board of Education v. Barnette*, (1943) 319 U.S. 624.

62. *Romesh Thappar v. State of*

Madras, 1950 (S.C.J.) 418.

63. *Rex v. Itwari*, (1949) 4 D.L.R. 11 (All.)

64. *Machinder v. The King*, A.I.R. 1950 F.C. 129.

65. *Nek Mohammad v. Prov. of Bihar*, A.I.R. 1949 Pat. 1 (F.B.).

Though India is a secular state and every religion has a right to have propagandists, when such propaganda is through loud-speakers in a crowded and noisy locality to the detriment of public morals, health or order, it is prohibited by Art. 25. A loud-speaker may take one to 'Hell' instead of 'Heaven' by the very volume of its sound.⁶⁶

Scheme of Arts. 25 to 28 and History of Religious Freedom.

The right to freedom of religion is elaborated in Articles 25 to 28. Article 25 merely declares the freedom of conscience and free profession, practice and propagation of religion while Art. 25 deals with freedom to manage religious affairs, to establish and maintain institutions for this purpose. Article 27 postulates the freedom as to payment of taxes for promotion of any particular religion. Art. 28 stipulates the freedom as to attendance at religious institutions or religious worship in certain educational institutions. While Art. 25 protects the individual's freedom, Art. 26 deals with the right of the entire religious denomination or a section thereof. Individuals, whether a citizen of India or any other person can invoke Art. 25,⁶⁷ while a group of persons coming under one denomination as such can claim protection under Art. 26. In a case where Jains as individuals question the infringement of the right and do not do so as a religious denomination it was held Art. 25 alone would apply.⁶⁸ It may be noted that there is no provision as contained in the First Amendment of the American Constitution prohibiting the establishment of a religion by law. But this is of no moment since there is no state religion at all in India. Though Hinduism is the most ancient in India yet the tradition of this country has allowed the free growth of various religious denominations,—Christianity, Islamic faith, Jainism, Buddhism, Zoroastrianism etc. There is no State Department for religion. Of course under the Government of India Act, 1935, there was an Ecclesiastical Department under the direct control of the Governor-General. Section 269 of that Act provided for appointments of Chaplains but all this is past history with the coming into force of the present Constitution. But even under the earlier Government of India Act (*vide* Sec. 298) there could be no discrimination on the ground of religion, etc. In the matter of recruitment to Government services or for holding or disposing of property or in the matter of any occupation, profession etc., Articles 15 and 16 elaborate these aspects in the Constitution. The memorable Queen Victoria's proclamation of 1858 had often been quoted and relied upon by the people of India as the sheet anchor for the State's religious neutrality. The memorable passage is worth recording. It reads:

"Firmly relying ourselves on the truth of Christianity and acknowledging with gratitude the solace of religion, we disclaim alike the right and the desire to impose our convictions on any of our subjects. We declare it to be Our Royal Will and pleasure that none be in anywise favoured, none molested or disquieted by reason of their religious faith or observance but that all shall alike enjoy the equal and impartial protection of the law, and We do strictly charge and enjoin all those who may be in authority under us, that they abstain from all interference with the religious belief or worship of any of our subjects, on pain of our highest displeasure, and it is our further will that so far as may be, our subjects, of whatever race or creed, be freely and impartially admitted to offices in our service, the duties of which they are qualified, by their education and integrity, duly to discharge."

66. *Masud Alam v. Commissioner of Police*, A.I.R. 1956 Cal. 9.

67. *Ratilal Panachand v. State of*

Bombay, A.I.R. 1953 Bom. 242.

68. *Ibid.*

This grand and lofty ideal of religious neutrality has been so long in vogue as a cardinal principle of State Policy that the framers of our Constitution felt the need to reaffirm the policy in Articles 25 to 28. It is gratifying to record about the unique catholicity of India. There is sufficient reason, and in fact such an opinion was advanced by a small section, to make India a Hindu state. But Noble India refused such a narrow concept. It suits Pakistan to be an Islamic state but India has grown taller for discarding such a narrow ideal.

A secular State does not connote an irreligious state or an atheistic state. It only states that in matters of religion it is neutral. In fact in clause (1) of Art. 25 "morality" is the guiding principle. Non-interference in religion involves non-justiciability in respect of disputes relating to religious rites, doctrines, etc. These are matters to be decided by the religious denomination as a body. Courts of law cannot adjudicate on them and pretend to regulate religious tenets, rites, or ceremonies.⁶⁹ But if it also relates to property then on that matter Court's jurisdiction exists.⁷⁰ It is the ancient doctrine in India that the State do protect all religions but interfere with none.⁷¹

Article 25, Clause (2).

The freedom of conscience, and free profession, practice and propagation of religion guaranteed in Art. 25 Clause (1) is subject to the limitations set out in Clause (2) sub-clauses (a) and (b). No existing law or the right of the state to legislate is affected in so far as such law—

- (1) regulates or restricts any economic, financial, political or other social activity which may be associated with religious practice;
- (2) provides for social welfare and reforms or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Secular Aspect of Religion.

Sub-clause (a) of Cl. (2) deals with the purely secular aspect of religion. Those rites and observances that are the essence of religion do not come under the category of secular activities. The former are sacrosanct and are not to be interfered with by the state. But those activities which are not truly religious in character and are more secular, though they may go by the name of religion, can be regulated by the state. Such activities may touch the economic, financial, political or other social interests of the citizen though they may be given a religious background. The reason is that they are not part of the essence of religion. The latter can connote only one's relation with the Supreme Being and cannot affect secular activities. Thus Hindu and Mohammadan marriages though they are founded on their respective holy scriptures, they are not the core or the essence of religion and hence can be regulated by legislation. Matters of personal law can in the larger interests of society be regulated in so far as they affect morality, health, public order or any of the Fundamental Rights adumbrated in Part III of the Constitution. But if these are not affected and the matter is purely religious divorced from all secular tinge, no state interference is called for. Religious propaganda can be allowed provided it does not affect public order, morality or health. In

69. *Ramalinga v. Sundara*, A.I.R. 1929 Mad. 526. *Aiyannachar v. Sadagopachariar*, A.I.R. 1939 Mad. 757.

70. *Advocate-General of Bombay v.*

Yusuf Ali, A.I.R. 1921 Bom. 338.

71. *Vasudev v. Vamanji*, (1881) I.L.R. 5 Bom. 80.

the name of religion there cannot be tormenting of the human body, human sacrifice, or animal sacrifice, or infant marriage, Sati, polygamy etc. Reasonable regulations and prohibitions in the interests of the community is allowed but not arbitrary restraint of purely religious observances or practices. Nor can there be political propaganda through organised secret religious meetings. Nor can anti-war activities be carried on in the name of religion to the detriment of the security of the state;⁷² nor can a person avoid compulsory military training for the purpose of defence on the score of religion (*vide* Art. 23).

Secular aspects of Religious practice may be legislated upon.

List III of Schedule VII Entry 5 allows legislation in respect of "marriage and divorce; infants and minors' adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law".

These items, though some of them are affected by religious practices and rituals such as in marriage and adoption, yet as they are really secular in their nature, they come under legislative regulation in the interests of society. But the question may be posed if under Art. 25 Cl. (2) a sacramental form of Hindu marriage can be prohibited. Obviously, it cannot be as under Art. 25 Cl. (1) the restriction can be imposed only on the ground of public order, morality, health etc., otherwise neither the religious basis of a marriage nor adoption can be interfered with. New forms of marriage or adoption can be introduced by legislation but no abolition of the old sacramental types can be permitted as it comes under the guarantee of freedom of religious practice. The new Hindu Code has to be examined in the light of these criteria.

Social Reform.

Clause (b) of Art. 25 (2) provides for social welfare and social reform. Social reform connotes the concept of eradication of practices or dogmas which stand in the path of the country's onward progress as a whole and which does not affect the core of religion. Thus the prevention of ex-communication has been considered a social reform.⁷³ To prohibit a person from marrying a second wife when first wife is alive is another such reform.⁷⁴ The need for a second marriage on the score of begetting a son is not the essence of religion since the same could be achieved by an adopted son who could supply the deficiency in the spiritual and ritual fields also for the father. Dr. Ambedkar had assured,⁷⁵ "No sensible state, in the name of social reform, would affect the very essence of any religion. The legislation would only touch questionable practices, dogmas and the like which stand in the way of the social progress of the country as a whole, e.g., the system of Devadasis."

Art. 25 (2) Cl. (b) further provides that it is permissible to open Hindu religious institutions of a public character to all classes and sections of Hindus. The Temple Entry Act of Madras or Bombay is a forerunner in this connection. The several Hindu Social Disability Removal Acts of the various States point only to this. There is an attempt to consolidate and have one

72. *Adelaide Co. v. Commonwealth*, (1943) 67 C.L.R. 116.

73. *Saifuddin v. Tyejji*, (1952) 7 D.L.R. 28 (Bom.).

74. *Sreenivas v. Saraswathy*, A.I.R. 1952 Mad. 193.

75. Constituent Assembly Debates, Vol. III, p. 781.

central Act in this matter. The object appears to be to remove all traces of discrimination and inequality among the various sections of the Hindu social fabric. The Article confines its sphere only to public institutions, which are declared to be so either by grant or user. It would not affect private endowments or institutions of the Hindus. The term "Hindu" includes Jain, Sikh and Buddhist also (*vide* Explanation II).

Among the existing Acts which remove social disabilities may be listed—
The Madras Temple Entry Act.

The Bombay Harijan Temple Entry Act XXXV of 1947.

The C.P. and Berar Temple Entry Authorization Act, 1947.

The legislative entry regarding religious institutions is found in Entry 28 of List III of Schedule VII.

Sikhs.

The right of Sikhs to wear and carry Kirpans is recognized as a religious practice in Explanation I. It has been so recognized from early times (*vide* the Nehru Committee report of 1928 and the Sapru Committee report of 1945). But this right cannot be abused by the Sikhs by demanding that each Sikh could carry any number of Kirpans. Carrying more than one Kirpan requires a licence. In *Rex v. Dhyani Singh*⁷⁶ it was held "Kirpan means a sword and its size or shape has not been prescribed by the Sikh religion. It may be a sword of any size or shape, though in Rule 17 of the U.P. Arms Rules as well as in Explanation to Art. 25 of the Constitution the word 'Kirpans' in plural has been used in relation to Sikhs and emblems. It could never have been intended that in the name of religion a Sikh could carry any number of Kirpans or swords as a religious emblem when one of the Sikh Gurus had ordered that the Kirpan should be worn only as one of the five emblems, nor could it have been intended that a Sikh should possess without licence any number of arms for the possession of each of which others had to take a licence. Consequently, a Sikh is entitled to possess only one sword. He cannot possess the extra sword without a licence."

Analogous Provisions.

The other analogous provisions as to prohibition of discrimination on the ground of religion are Arts. 15, 16, and 29 (2). While Art. 25 deals with the freedom of conscience, profession, practice and propagation of religion, Art. 26—28 relate respectively to freedom to manage religious affairs, freedom as to payment of taxes for promotion of any particular religion and the freedom as to attendance at religious instruction or religious worship in certain educational institutions.

Judicial Interpretation.

A legislation which simply enacts in statutory form the doctrine of cypres applicable in the general law of charitable trust has been held to be *intra vires*.⁷⁷ This could be so only when the objects of the founder "were not expedient, practicable, desirable or necessary." Thus in the Bihar Hindu Religious Trusts Act, Sections 39 and 40 empower interference only if the object of religious trusts has ceased to exist or has become impossible of

76. A.I.R. 1953 All. 53.

77. *Dwari Kadasji v. State of Bihar*,

A.I.R. 1957 Pat. 615.

achievement, or in the alternative if the object of the trust was vague or uncertain. Sec. 28 (2) (j) of the said Act was also *intra vires* as it merely enacted in statutory form (not the doctrine of cypres) but a rule of the English Chancery Court that a trustee may with the sanction of the court convert any property of the trust into another property, if such conversion is for the benefit of the trust. The power was also surrounded by ample safeguards and there was hence no unreasonableness either from the substantive or procedural aspect.⁷⁷

In *State v. Narasu Appamall*⁷⁸ the Bombay Prevention of Hindi Bigamous Marriages Act XXV of 1946 was held *intra vires* of Arts. 14, 15 and 25. Chagla, C.J., observed, "A sharp distinction must be drawn between religious faith and belief. If religious practices run counter to public order, morality or health, or a policy of social welfare, upon which the state has embarked, then the religious practices must give way before the good of the people of the state as a whole." The court opined that the Act in question had not trespassed upon the religious beliefs of the Hindus and said, "It is perfectly true that the Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. The same religion also recognizes the institution of adoption. Therefore, the Hindu religion provides for the continuation of the line of a Hindu male within the framework of monogamy. . . . Further, monogamous marriage is a measure of social reform. . . . If the legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the state, then it is not for a court of law to sit in judgment upon that decision."

In *Srinivasayyar v. Saraswathi Ammal*⁷⁹ also, the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, was held *intra vires* of Arts. 15 and 25. It was observed. "The freedom to practise religion is not an absolute right and it is subject to public order, morality and health and subject to the other provisions of this Part. Art. 25 (2) further empowers the legislature to enact a law providing for social welfare and reform."

In *Lakshmindra Theertha Swamiar of Shirur Mutt v. Commr., H.R.E. Madras*,⁸⁰ Sections 21, 23, 24 and 54 of the Madras Hindu Religious and Charitable Endowments Act, 1951, were held *ultra vires* of Art. 25 on the ground that they vested very large powers in the Commissioner, amounting to clear interference with the practice of religion, *i.e.* carrying on worship and the propagation of religion by instructing disciples and initiating them into the mystery of religion. The court observed in the instant case, "Freedom of conscience is the minimum of religious liberty. It is intangible as it is subjective and is not capable of legal protection except that a person may not be compelled by law to abandon his belief, creed or opinions. A man may not only hold his religious opinions but may put them into practice and translate them into articulate force by profession, practice and propagation. It is very difficult to separate religion and practice from politics or ethics. But in the interests of the state it cannot be contended, at any rate at the present day, such practices cannot be legitimately be prohibited by legislation though such legislation might infringe religious liberty." The power to enter into religious institutions under Sec. 21 and the very wide power conferred by Secs. 23 and 24 to issue lawful directions to be obeyed, the right to interfere with the dittam under Sec. 54 are all invasions of the right to the practice of

78. *State of Bombay v. Narasu Appa*
53 Bom. L.R. 779: 6 D.L.R.
(Bom.) 174: A.I.R. 1952 Bom.

84.
79. A.I.R. 1952 Mad. 193.
80. A.I.R. 1952 Mad. 613.

religion. But in the instant case the Matadipthi was questioned for prescribing a personal belonging as a Japanmala to the doctor who cured him of asthma, for presenting clothes and paying bonus to temple servants for Deepavali and there was a direction by the Board to divert the funds donated for a 'Balamandir' for pisciculture in the tank, etc. These lawful orders ostensibly issued under Sections 21, 23, 24 and 54 certainly infringe the freedom vouchsafed in the practice of religion under Art. 25. "The Swamiji's tranquillity and peace of mind which are essential for deep contemplation may also be disturbed. The holiness and sanctity of the institutions are destroyed thereby." Their lordships further quoted *Vidya Purna Thirthaswami v. Vidhyaridhi Thirthaswamy*⁸¹ to this effect: "Now there can be no doubt that institutions of the class under consideration (Mutts) were established as centres of theological learning and in order to provide a line of competent teachers with reference to the established Hindu creeds of the country. . . . The influence exercised by Mutts as centres of learning on the religious and other literature of the country cannot be denied. The varied and wellknown contributions made thereto by the famous Vidyaranya Swami of Sringeri or Sarada Mutt or under his auspices are among the most conspicuous examples of this kind . . . and it is to his commentaries that the modern world owes its knowledge of the traditional meaning of the oldest of sacred book—the Rigveda."

In *Surya Pal Singh v. U.P. Government*⁸² the acquisition of Waqf property under Art. 31 (to which right Art. 25 is subject) was held to have nothing to do with the profession or practice of religion.

In *Syedna Tahr Saifuddin v. Tyebkhair Mossaji Koicha*⁸³ it was held that the Bombay Prevention of Excommunication Act 42 of 1949 was a valid social reform legislation not contravening Art. 25 or 26 of the Constitution. "The right to ex-communicate a member of a community is not part of religious faith and belief. At best it can only be a religious practice and if in the opinion of the legislature, such a religious practice runs counter to public order, morality, health or a policy of welfare upon which the state has embarked, then the religious practice must give way and the legislation must prevail against the practice."

The Supreme Court held in *Commissioner, H.R.E., Madras v. Sri Lakshmi Thirtha Swamiar of Sri Shirur Mutt*⁸⁴ in connection with the application of Art. 25 to Mutts, "A Mathadhipati is not a corporate body; he is the head of a spiritual fraternity and by virtue of his office has to perform the duties of a religious teacher. It is his duty to practise and propagate the religious tenets of which he is an adherent and if any provisions of law prevents him from propagating his doctrines that would certainly affect the religious freedom which is guaranteed to every person under Art. 25. Institutions as such cannot practise or propagate religion; it can be done only by individual persons and whether these persons propagate their personal views or the tenets for which the institution stands is really immaterial for purposes of Art. 25. It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery or in a temple or a parlour meeting."

Adverting to the concept of religion, the Supreme Court stated, "Religion is a matter of faith with individuals or communities and it is not necessarily

81. 27 Mad. 435.

82. A.I.R. 1951 All. 674.

83. A.I.R. 1953 Bom. 183.

84. A.I.R. 1954 S.C. 282. See also *Sri Jagannath Ramanya Das v. State of Orissa*, 1954 S.C. 400.

theistic. There are well-known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it will not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might even extend to matters of food and dress." Article 25 guarantees not only freedom of religion but also the practice of it. The language of Arts. 25 and 26 is sufficiently clear to enable the court to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. The freedom vouchsafed in Art. 25 extends to beliefs as also the practices of religion, the latter being subjected to the restrictions laid in Art. 25 (1).

In *Narayanan Nambudripad v. State of Madras*⁸⁵ the constitutional position of religious institutions in India vis-a-vis the U.S.A. was examined. The First Amendment to the American Constitution consists of two clauses which deal with distinct subjects. The first clause is directed against legislation in respect of "establishment of religion" and the second against any law prohibiting the "exercise of religion." Under the former the State is disconnected from "establishment of religion"; under the latter the individual is guaranteed freedom in the profession and practice of religion. The scope of the two clauses is thus different. While Articles 25 and 26 of the Constitution of India reproduce the law as enacted in the second clause of the First Amendment therein, there is nothing in our Constitution which corresponds to the first clause therein. There are specific prohibitions in Articles 27 and 28. "The inference is obvious but the framers of our Constitution were not willing to adopt in its entirety the theory that there should be a wall of separation between Church and state which the first clause of the First Amendment (America) was interpreted to embody. What in fact they did was to adopt that principle in its application to particular questions. Thus Art. 27 embodies the principle that no tax should be imposed on any person for the maintenance or promotion of any religion. Art. 28 (1) prohibits the imparting of religious instruction in state-managed educational institutions. Apart from making provisions in respect of particular subjects, the Constitution does not enact a general prohibition of legislation in respect of establishment of religion. . . . On the other hand there are provisions in our Constitution which are inconsistent with the theory that there should be a wall of separation between the Church and the state. Article 16 (5) recognizes the validity of laws relating to management of religions and denominational institutions. Article 28 (2) contemplates the state itself managing educational institutions wherein religious instruction is to be imparted. And among the subjects over which both the Union and State authorities have legislative competence set out in List III of Schedule 7 of the Constitution of India, Entry No. 28 is as follows: Charitable and religious institutions, charitable and religious endowments and religious institution." It is difficult in the face of these provisions to accede to the contention that our Constitution has adopted the American view that the state should have nothing to do with religious institutions and endowments.

The exercise of religion by a person and by a religious denomination protected by Arts. 25 and 26 is a private purpose but the administration of

properties endowed on religious institutions is a public purpose. The position in law before the Constitution was that while the state did not interfere in matters of religion in its doctrinal and ritual aspects treating it as a private purpose, it did exercise control over the administration of properties endowed on religious institutions treating it as a public purpose, if the institutions were themselves dedicated to the public. The Constitution of India has not changed this aspect of the law at all. Hence in the instant case⁸⁵ Sec. 76 (4) of the Madras H.R.E. Act providing for payment of expenses of administration of the endowments by Government was held *intra vires* of Art. 282.

In *Ratilal v. State of Bombay*⁸⁶ the Supreme Court has posited that what sub-clause (a) of Clause (2) of Art. 25 contemplates is not state regulation of religious practices as such which are protected unless they ran counter to public health or morality, but of activities which are really of an economic, commercial or political character though they are associated with religious practices. The court further opined, "Religion is not necessarily theistic; there are well-known religions in India like Buddhism and Jainism which do not believe in existence of God or any intelligent First Cause. . . . A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well. This Article protects acts done in pursuance of religious belief as part of religion. For religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrine."

In *Pran Krishna Kamar v. Junior Assessor, Sibarampore*⁸⁷ procurement under the West Bengal Food Grains (Intensive Procurement) Order, 1952, even of the entire produce of land dedicated to the deity was sustained. There was no provision for any exemption to be given in respect of the *bhog puja* of the deity or for the consumption of the beneficiaries. Though Articles 25 and 26 were not infringed directly yet the need for providing for the deity was pointed out by the court. An amendment was suggested in the law. A Hindu deity is no doubt a juristic entity but as Arts. 25 and 26 are subject to public order and as the procurement order of 1952 arose out of a public emergency demanding proper distribution of food grains to prevent disorders, in the absence of specific recitals in the trust deed, the shebait is not entitled to the usufruct of the land for his family use.

In a Patna case⁸⁸ the Bihar Religious Trusts Act 1 of 1951 was sustained as providing for the better administration of Hindu religious trusts and for the protection and preservation of the properties appertaining to such trusts. The guarantee in Art. 25 was not thereby violated. The freedom vouchsafed in Art. 25 is not uncontrolled as it is a freedom in a social organization which requires the protection of law against the evils masquerading in the name of religion, against evils which menace the welfare and morals of the people. Hence unless the impugned legislation directly attempts to control the practice and propagation of religion there is no violation of Art. 25.

In an Allahabad case⁸⁹ the U.P. Removal of Social Disabilities Act was held to be *intra vires* of Art. 25 (1). The U.P. Act falls within the definition

86. A.I.R. 1954 S.C. 388.

87. A.I.R. 1954 Cal. 241.

88. *Baijayandee v. State of Bihar*, A.I.R. 1954 Pat. 266. See also *Sukhram Das v. President, Bihar State Board of Religious*

Trust, A.I.R. 1954 Pat. 278.

Ramakrishna Das v. State of Bihar, A.I.R. 1954 Pat. 279.

89. *Sugami Hariharanand Saraswathy v. The Jailor I.C. District Jail, Banaras*, A.I.R. 1954 All. 801.

of "existing law" given in Art. 366 (10) and is therefore protected by clause 2 of Art. 25. The Act only provided for the removal of those distinctions which caste-Hindus enforced on the Harijans in respect of, among other matters, entry of Harijans in temples on the same footing as caste-Hindus. Article 25 Cl. (2) (b) excepts social reforms and throwing open of temples to Harijans.

In another Allahabad case⁹⁰ the right to take out processions of religious nature was sustained as contained in the guarantee extended by Art. 25. Persons of whatever section are entitled to conduct religious procession through public streets provided they do not interfere with the ordinary use of such streets by the public and subject to such directions as the magistrate may lawfully give to prevent obstructions of the thoroughfare, or breaches of the public peace. The right of profession or practice of one's religion is subject to public order. Hence a Magistrate's power under Sec. 144, Cr.P.C., to regulate or prohibit processions is discretionary and cannot be questioned by civil courts, as the responsibility for maintaining public order rests on the magistracy.

Temple Entry Legislations.

The Madras Temple Entry Authorisation Act V of 1947 as amended by Madras Act XIII of 1949 was held *intra vires* of the Constitution by the Madras High Court.⁹¹ It was posited in this case that the right to manage in matters of religion was subject to public order, morality and health. It is not moral to prevent pious Hindus from being allowed entry to temple solely on the ground of their having been born in a particular community. This kind of inequality is definitely sought to be removed by Art. 17. The power of the state to make a law for throwing open Hindu religious institutions of a public character is set out in Art. 25 (2) (b) and this is not in any way circumscribed, restricted or whittled down by the provision in Art. 26 (b) giving the right to manage its own affairs in matters of religion. Managing the affairs in matters of religion denotes that there is a kind of superintendence or supervision mainly with regard to property (*vide* Art. 26), while the practice of religion would include the right to prescribe modes of worship, the class of persons who can worship and the time at which they can worship etc. (*vide* Art. 25). The question of temple entry is not involved in Art. 26 (b) but that it is concerned only in Art. 25 (2) (b) is clear from the fact that Art. 25 (2) (b) is an exception to Art. 25 (1) which gives Fundamental Right to any citizen freely to profess, practise and propagate his religion. This freedom of practising religion can be restricted by the legislature when it infringes the right of all classes of Hindus to worship in a Hindu religious institution of a public character. It is this kind of temple entry that is envisaged in Art. 25 (2) (b). The word "manage" connotes govern, command, control or conduct. The word "affairs" means general business. Hence what is contemplated is management of property etc. and can in no way have reference to depriving certain classes or sections of the Hindu public of their rights guaranteed by Art. 25 (1).

Judicial Interpretation.

In *Ramprasad Singh v. State of U.P.*⁹² it has been held that Rule 27 of

90. *Mohammad Siddiqui v. State of U. P.*, A.I.R. 1954 All. 756.

91. *Shri Vishwothama Thirtha Swamikal of Soda Mutt, Udipi v.*

State of Madras, (1956) 1 M.L.J. 125 (D.B.): A.I.R. 1956 Mad 541.

the Government Servants Conduct Rules which provides that a Government servant cannot marry a second wife during the presence of the first wife without the permission of the State Government does not offend Article 25. The act of performance of a second marriage in the presence of the first wife cannot be regarded as an integral part of Hindu religion nor can it be regarded as practising or professing or propagating Hindu religion.⁹²

In *Sanjib Kumar Choudhry v. Principal, St. Paul's College*,⁹³ the question

whether educational institutions run on Christian principles and receiving state aid have power to impose restrictions on practice of other religions within the college precincts was mooted. It transpired the college had more than ninety per cent of the students belonging to the Hindu community. The Principal refused them permission to celebrate the Saraswati Puja within the college compound. It was held by the Calcutta High Court that as the petitioners' writ under Art. 226 was intended to force the hands of the authorities to allow idol worship being conducted within the college precincts, it was misconceived. "Art. 29 (2) of the Constitution had no application to the facts of the case. Merely because as a result of Art. 29 (2), there was a legal right in members of the Hindu community to get admission into the college it does not follow that there is every right under Art. 25 to freely profess, practise and propagate their religion within the precincts of the college receiving state aid." To do so will be to misread Art. 25 and extend the protection to secular activities. Under Art. 30, Christian institutions opened primarily for propagation of Christian religion and secondarily for rendering humanitarian services are within the bounds of law. The only limitations for the former are public order, morality or health, nor can the institution compel its alumni to the practice of Christian religion. While it cannot interfere with the belief and profession of religion of the students concerned, it can certainly control outward manifestations of it within the boundaries of its property. The petitioner, knowing all these limitations when he joined the college, cannot now turn round and ask the college authorities to violate the basic principles upon which the college has been established by its founders.

A judge when called upon to pronounce on religious freedom is not justified in writing his private notions of policy into the Constitution.⁹⁴ But Government is entitled to know if people who have come from abroad and who have established Missions are friendly to Indian aspirations and Indian culture. The inquiry is quite legitimate in order to find out how far they are friendly or hostile to Indian aspirations and Indian culture.⁹⁴ Such comprehensive and non-discriminatory inquiry is quite *intra vires*. But legitimate political activity of one section of the public is germane to the growth of democracy. What is taboo is undesirable political activity.⁹⁴ The law permits denominational institutions which have full powers of internal management. But the state can regulate if such management affects public order, health or morals. If undue pressure is brought upon the pupils to join prayers of a particular type, it will tend to disorder and affect public peace. But it is open to give special concessions to Christians in a Christian institution *e.g.*, free hospital service.⁹⁴ It is the Mission's private right to spend its monies as it

92. A.I.R. 1957 All. 411; 1957 All. L.J. 439.

93. A.I.R. 1957 Cal. 524; 61 C.W.N. 717.

94. *Francis v. State of M.P.*, (1957) M.P.L.J. 1 (Nag.), relies on 310 U.S. 624.

thinks best. May be the Government can enquire how much foreign money flows to these Missions and if such money is used for unlawful purposes affecting public order, health or morals. It is not the province of the Government to question the high salaries or emoluments of Pracharaks, so long as public order, health or morals are not affected by them. The form of rituals, the expenditure on the same are all not matters for Government scrutiny. All such activities come under practice of religion. But under cover of religion harmful activities of a secular nature cannot be allowed to grow.⁹⁵

The constitutionality of the Government ordering inquiry into the activities of Christian Mission came in for full discussion in the instant case.⁹⁴ Whether the methods to propagate religion adopted by Christian Missions in any way contravened public order, health and morality was quite legitimate and legal to inquire into. Such inquiry can certainly extend to the question whether the Christian Missions and Christians were being harassed. Though Sections 107, 144, and 145, Cr.P.C., were preventive and can be used vis-a-vis religion and public tranquillity, the Government can, besides preventive action, also collect information by an inquiry. The test of clear and present danger is applied to religious freedom and freedom of speech and press, to discover at what stage the freedom of the citizen ends and the power of the state begins. What applies to positive action does not necessarily apply to an inquiry because while enquiry goes on there is no interference such as there is when positive action is taken.

In *Dwarikadasi v. State of Bihar*⁹⁵ it was stated that Arts. 25 and 26 were not contravened by Sections 30 and 49 of the Bihar Hindu Religious Trusts Act 1 of 1951. Those Sections merely enacted in statutory form the doctrine of *Cypres*. The Act empowered the Board of Religious Trusts to interfere only if the object of the trust was vague or uncertain.⁹⁵

The Supreme Court in *Sri Venkataramana Devaru v. State of Mysore*⁹⁶ held that the limitation "subject to the other provisions of this Part" occurs only in Cl. (1) of Art. 25 and not in Cl. (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practise, and propagate religion. It is this right that is subject to the other provisions in the chapter on Fundamental Rights. Clause (1) is subject to Clause (2) of Art. 25. A law therefore which falls within Art. 25 (2) (b) will control the right conferred by Art. 25 (1). The limitation in the latter cannot apply to that law. Article 25 (2) (b) applies in terms to all religious institutions of a public character without qualification or reserve.⁹⁶ Public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof and denominational temples would be included therein. Applying the rule of harmonious construction in the instant case⁹⁶ Art. 25 (2) (b) will be rendered nugatory if denominational temples are included. But the language of the Article clearly includes them. The right protected by Art. 25 (2) (b) is a right to enter into a temple for purposes of worship and the construction should be liberal in favour of the public. No member of Hindu public thus can claim that a temple should be kept for worship at all hours of the day and night or that he can personally perform those services which the Archakas could alone perform. It is also a well-known practice to limit some of the services to persons who have

95. A.I.R. 1957 Pat. 615; I.L.R. 33 Pat. 682. Distinguishes A.I.R. 1954 S.C. 388: 1954 S.C.J. 480.

96. A.I.R. 1958 S.C. 255: (1955) S.C.J. 382.

been specially initiated, though at other times, the public in general are free to participate in the worship. Thus of the limitations to which Art. 25 (2) (b) is subject, one such arises in the process of harmonising the right conferred by Art. 25 (2) (b) with that protected by Art. 26 (b). Exclusive right of the members of the community to worship for all the time will be hit by Art. 25 (2) but the distinct right, namely, that during certain ceremonies and on special occasions, it is only the members of the Gowda Saraswath Brahmin community that have the right to take part therein, and that on those occasions all other persons would be excluded would clearly be a denominational right.⁹⁷ Thus it is possible to protect the rights of the community on those special occasions without affecting the substance of the right declared under Art. 25 (2) (b). This strikes a balance between the rights of the Hindu public under Art. 25 (2) (b) and those of the denomination of the trustees in question. It was further held that though the members of the public were not parties to the litigation, they could be bound by the result of it, since it was their rights that had been fought for by the Government.

The right conferred by Art. 25 (2) (b) is a right conferred on "all classes and sections of Hindus" to enter into a public temple. On the unqualified terms of that article, that right must be available whether it is sought to be exercised against an individual under Art. 25 (1) or against a denomination under Art. 26 (b). Art. 25 (1) deals with rights of individuals while Art. 25 (2) is wider in its purport and has reference to rights of communities and controls both Art. 25 (1) and Art. 26 (b).⁹⁷

When the temple is exclusively a Jain temple dedicated to and for the benefit of the Jain community, then the members of the Jain community have clearly a right to enter and worship in the temple according to the principle and forms of their religion.⁹⁸ Religious practices are matters of religion within the meaning of Art. 26 (b). What constitutes the essential part of religion is primarily to be ascertained with reference to the doctrines of that religion itself.⁹⁹ The presence of a Shivling and the worship of it by the Hindus is repugnant to the principles of Jainism and Jain worship of Tirthankars and to the sentiments of Jain worshippers. The State therefore has no right to introduce a Shivling in the temple and prohibit the members of the Jain community from entering the temple and from worshipping except on the conditions of Hindus being allowed to worship the Shivlinga. Such acts would contravene Articles 25 (1) and 26 (b). There is no question of public order, morality or health arising therein.⁹⁸

It was held in *Mahamed Hanif Quareshi v. State of Bihar*¹ that the sacrifice of a cow on Bakr Id Day is not an obligatory act, for a Muslim to exhibit his religious belief and idea and consequently there was no violation of Art. 25 (1). The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief is subject to state regulation imposed to secure order, public health and morals of the people.

Articles 25 and 26 clearly make a distinction between matters of religion and holding and management of property by religious institution. In matters of property there is always a secular angle which is supplied by

97. A.I.R. 1958 S.C. 255: (1955) S.C.J. 382.

98. *Tejraj Chhogalal Gandhi v. State of M.B.*, A.I.R. 1958 Mad. Pra. 115.

99. *Ibid.*, relies on A.I.R. 1954 S.C. 282.

1. A.I.R. 1958 S.C. 731, follows A.I.R. 1954 S.C. 388.

the law of the country and no religious denomination can make a law about its own property and nullify thereby the law of the land.² In the instant case it was held that the property of the Christian religious institutions is as much subject to law as any other private property. To the extent matters of religion is involved in the disposal or use of the property, to that extent only laws cannot be made. But there is nothing to prevent the legislatures to enact laws for regulating property.

It may be that the personal law of Muslims allows four wives for a man. But having more than one wife is not part of religion. So the provision in law in favour of monogamy does not violate Article 25.³ In an Andhra Pradesh case⁴ it was held that S. 5 (3) of the Commission of Enquiry Act allowing the right of entry, search and seizure did not violate the religious sanctity of an institution nor was it likely to wound religious sentiment. The section was held *intra vires* of Articles 25 and 26.⁴

Article 26.—"Subject to public order, morality, and health, every religious denomination or any section thereof shall have the right—

Freedom to Manage Religious Affairs.

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

FOREIGN CONSTITUTIONS

The U.S.A.

The First Amendment says:

"Congress shall make no law respecting an establishment of religion. . ."

Eire

Article 44 (2) of the Constitution states:

"Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable and maintain institutions for religious or charitable purposes.

"The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation."

Ceylon

Section 29 (2) of the Ceylon Constitution Order-in-Council, 1946, reads:

"No such law shall alter the constitution of any religious body except with the consent of the governing authority of that body: provided that, in

2. *The State of M.P. v. Mother Superior, Convent School*, A.I.R. 1958 M.P., 362, follows A.I.R. 1954 S.C. 388.

3. *Badruddin v. Aisha Begam*, 1957 A.L.J. 300.

4. *Narayanadoss v. T. Neddari Rao*, A.I.R. 1959 Andh. Pra. 148.

any case where the religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body."

Rumania

Section 27 of the Constitution states:

" . . . The organization and functioning of the different religious denominations shall be regulated by law."

Germany

Section 41 (2) of the Constitution of the German Democratic Republic says:

"Institutions belonging to religious societies, religious acts and religious instruction shall not be misused for unconstitutional objects or in the interests of a political party."

Section 43 states :

(2) "Every religious society shall order and administer its own affairs subject to the law applying to all.

(3) "The religious societies shall continue to be corporation in public law in so far as they were so hitherto. Other religious societies shall receive like rights on application."

Sec. 45 states:

(1) The forms of public support given to the religious societies in virtue of law, contract or special legal title, shall be commuted by law.

(2) The property and other rights of the religious societies and unions in their establishment, foundations and other property for purposes of public worship, instruction and charity are guaranteed.

COMMENTARY ON FOREIGN CONSTITUTIONS

In America the Congress has no power to legislate regarding the establishment of religion. Full freedom to the various denominations to manage their religious affairs and institutions is apparent. In Ireland (Eire) the right to manage its own affairs, to own property and to maintain institutions for religious and charitable purposes is guaranteed to all religious denominations. The diversion of religious Trust funds is prohibited except in rare cases of public interest. In Ceylon there is complete autonomy extended to religious bodies. In Rumania such bodies can function in accordance with law. In Germany political institutions are to be completely divorced from religious bodies. In India autonomy in the matter of religious bodies is given subject to public order, health and morals.

India

Article 26 vouchsafes the right to manage religious affairs subject to the interests of public order, health and morality. The right extends (a) to establish and maintain institutions for religious and charitable purposes, (b) to internal management in all matters of religion, (c) to own and acquire property, (d) to administer such property in accordance with law.

The term "denomination" connotes "a Sect writ large." Systems of philosophy governing the Hindu society such as *Dvaita*, *Advaita*, *Sakhia* come

under the appellation of denomination.⁵ The denominations may be enabled to exercise all or any of the four rights outlined in Art. 26. It is not at all necessary that it should possess all these four rights to claim recognition as a religious denomination.

While right to manage its own affairs in matters of religion, the right does not extend to matters not of religion. Thus the right to expel or excommunicate was considered as not to be a matter of religion and any legislation that forbids excommunication was considered as valid in the interest of social reform.⁶

The right to own property by a religious body is subject to the state's right of acquisition by authority of law.⁷

It must be clearly stated that the state should not interfere in the management of all religious institutions. In religious matters there ought to be absolutely no manner of interference except on the grounds of public order, health or morality. In secular matters of management and finance and details of administration also there ought to be the least interference except to safeguard the interests of the institution against *mala fide* or maladministration. The need for dissociation of the state from needless interference in religious affairs is in every way salutary. Justice Black put it tersely in *Everson v. Board of Education*⁸ thus: "The State cannot participate in the affairs of any religious organization or group and there must be a wall of separation between the state and religion. But the Constitution does not deny the value or the necessity for religious training, teaching or observance; rather it secures their free exercise but to that end it does deny that the State can undertake or sustain them in any form or degree. For this reason, the sphere of religious activity as distinguished from the secular intellectual liberties, has been given the twofold protection and as the State cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes the function altogether private. It cannot be made a public one by legislative acts. The realm of religious training or belief remains the kingdom of the individual man and his God. It should be kept inviolately private, not entangled in precedents or confounded with what legislature may legitimately take over with the public domain."

The phrase "to administer such property in accordance with law" would mean according to the law of the country, the general law and statute law. Administration of such property would necessarily be as trustees. Clause (b) does not govern clause (d). Each clause in Art. 26 is an independent right. Management of religious affairs (clause b) also carries with it regulation of rituals and expenditure thereon. But what is expected is prudent management as trustees and there can be no law which hampers such management to the detriment of the objects of the institution. Such a law would offend Art. 26.

As regards the position of Mattadipathis and their right to manage the Mutt's secular affairs and its properties, see *supra* notes under Art. 19 Cl. (f) and (g). The *Shirur Mutt* case discusses the whole matter in ample detail.

A right to maintain educational institutions of its own is guaranteed to every religious denomination or sect by Art. 30 (1).

5. *Shirur Mutt. v. Commissioner*, 1952 (1) M.L.J. 557.

6. *Saifuddin v. Tyebji*, (1952) 7 D.L.R. 28.

7. *Suryapal v. Government of U.P.*, A.I.R. 1951 All. 674.

8. (1947) 330 U.S. 1.

Judicial Interpretation.

The provision in the Travancore-Cochin Hindu Religious Institutions Act 15 of 1950 for the framing of a scheme by the Cochin Devaswom Board in respect of institutions falling within the definition of institutions in Sec. 61 (6) of the Act was held *intra vires*.⁹ For the scheme relates only to the management of the secular affairs and of the properties of the temple and not to matters of religion. It has been clearly stated by the Supreme Court in *Ratilal v. State of Bombay*,¹⁰ "As regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property, but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; a law which takes the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Art. 26 (d) of the Constitution."

In *Devaraja v. State of Madras*¹¹ it was stated, "The Gowd Saraswath Brahmin community is undoubtedly a religious denomination or at any rate a section of religious denomination. Therefore the protection under Art. 26 can be claimed on behalf of the trustees of the temple belonging to the denomination. Therefore, the provisions of the Madras Hindu Religious and Charitable Endowment Act in so far as they interfere with the autonomy of the religious denomination which own and has the sole and exclusive control of the temple should not be allowed to be enforced, including the provision relating to notification procedure which vests an arbitrary power in the Commissioner and the Government to wrest from the hands of the trustees the power to administer the temple. . . . In the case of Sri Venkatramana Temple, Mulki, the temple and its properties belong to the entire denomination of the community (Gowd Saraswath Brahmin community) resident in Mulki comprising all the three villages, excluding of course the *vaidikis*, i.e. priests of the temple. Therefore, what applies to the Chidambaram Temple owned by the denomination of Dikshatars should also apply to this temple, Sri Venkatramana Temple, Mulki."

In the *Shirur Mutt* case¹² it was stated, "The dictionary meaning of the word 'denomination' as given by Webster is a 'Collection of individuals classed together under the same name'. Now almost always, especially a religious sect or body having a common faith and organization, is designated by a distinctive name. Thus in contradistinction to Christians, Muslims, Zoroastrians, 'Hinduism' is a denomination in the larger sense. In a limited sense its various sets as Advaitas, Dwaitas, Vishistadwaitas and Saivites also can be termed denominations. The contention that the denomination contemplated by Art. 26 is not identical with a religious sect or members of a religious persuasion but it must be a closed body like a corporation cannot be accepted. It is rather difficult to dissociate the religious affairs of an institution from the property or its secular affairs. The secular affairs are only directed for the purpose of better management of the religious affairs for which alone the institution exists. They are inextricably mixed up.

"Article 26 is concerned with religious institutions and the consideration of the question whether there is any beneficial ownership in the properties

9. *Janardana Mallan Venkiteswara Mallan v. Cochin Devaswom Board*, A.I.R. 1957 Trav. Co. 307.
10. A.I.R. 1954 S.C. 388.

11. A.I.R. 1953 Mad. 149.

12. *Lakshminidra Theertha Swamiar v. Commr., H.R.H. Board*, A.I.R. 1952 Mad. 613.

of the institution by the members of the denomination is irrelevant as it is solely concerned with the institution which exists for spiritual and not for material benefit. . . . The expression 'in accordance with law' must now be understood in the light of the decision in *A. K. Gopalan v. State of Madras* [(1950) S.C.R. 88], as meaning statute law or law enacted by a competent legislature. . . . It is a question of degree whether in a given case the enacted law merely regulates or substantially takes away the right leaving to the denomination a mere vestige of the right. It would be enough if there was a substantial deprivation of the right to administer the property. In such a case the law, it must be admitted, cannot be upheld. . . . (In the instant case) the right to administer religious and secular affairs has been unduly interfered with as the head may not have an effective voice in the appointment of persons to carry on the administration under him. The appointment of a manager or agent requires the approval of the Commissioner and it was decided to frame a scheme or notify a temple, the Commissioner or the Government as the case may be, has the sole and exclusive right to appoint a paid executive officer. It is a substantial deprivation of the right to administer the property in accordance with law and the impugned Act. In so far as it takes away the rights to administer the religious and secular affairs of the Mutt it must be held to be invalid as infringing Art. 26." Thus Sections 28, 29, 30 (2), 31, 53, 54, 55 (2), 56, 58 (3), 59, 63 to 69, 70 (2) (3) (4), 76, 89 and 99 of the impugned Act are *ultra vires* of the Constitution as thereby the Government virtually assumes complete control over the Mattadipathis and Mutts.

In *Ratilal Panachand Ghandhi v. State of Bombay*¹³ it has been held that "religious freedom" is only to the extent of what actually is religion but the right to administer property is not religious and this can be regulated by statute. This is different from managing its own internal affairs pertaining to the domain of pure religion as dogmas, religious ceremonies, day-to-day affairs etc.

The Supreme Court sitting in appeal in the *Shirur Mutt case*¹⁴ observed, "The practice of setting up mutts as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara came a galaxy of religious teachers and philosophers who founded the different sects, and subsects of the Hindu religion. Each one of such sects, or subsects, can be called a religious denomination as it is designated by a distinctive name—in many cases it is the name of the founder—and has a common faith and common spiritual organization. The followers of Ramanuja who are known by the name of Shri Vaishnavas constitute a religious denomination and so do the followers of Madhavacharya and other religious teachers. . . . Art. 26 contemplates not merely a religious denomination but also a section thereof; the math or the spiritual fraternity represented by it can legitimately come within the purview of this Article." It was further held that the administration of its property by a religious denomination could be regulated by laws which the legislature could validly impose. But the right to manage its own affairs in matters of religion, no legislature can take away. Elaborating as to what are matters of religion the Supreme Court observed, "If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies

13. A.I.R. 1953 Bom. 242.

14. *Commr. of H.R.E. Board v. Sri Lakshminidra Tirtha Swamiar*

of Shirur Mutt, A.I.R. 1954 S.C. 282.

should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these will be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities will not make them secular activities, partaking of a commercial or economic character; all of them are religious practices coming under the category of matters of religion within the meaning of Art. 26 (b). What constitutes the essential part of a religion within the meaning of Art. 26 (b) is primarily to be ascertained with reference to the doctrines of that religion itself."

Further, "Under Article 26 (b) a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold, and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by wasteful expenditure on rites and ceremonies and the law therefore must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under Cl. (d) of Art. 26."

In *Narayanan v. State of Madras*,¹⁵ already adverted to under our commentary on Art. 25, there is no distinct wall of separation between the church and the state in our Constitution. There is no general prohibition against legislation in respect of "Establishment of Religion."

The Supreme Court in *Ratilal v. State of Bombay*,¹⁶ has affirmed that the right of the State to regulate administration of trust properties by a validly enacted law is subordinated to Art. 26 (d) whereby the religious denomination itself has been given the right to administer its property in accordance with any law which the state may validly impose. A law which denies this right to the religious denomination is *ultra vires* of Art. 26 (d). It has been further held that to divert the trust property or fund for purposes for which an authority created under a state Act or the court considers expedient or proper, although the original objects of the founder can still be carried out, is an unwarrantable encroachment on the freedom of religious institutions in regard to the management of their religious affairs.

In *Jagannath Ramanuja Das v. State of Orissa*,¹⁷ it was held that Secs. 38 and 39 of the Orissa Hindu Religious Endowments Act 4 of 1939 were invalid inasmuch as it enabled the setting up of scheme without the intervention of any judicial tribunal. This amounts to an unreasonable restriction upon the right of property of the Superior of the religious institution which is blended with his office. It was further pointed out that Sec. 46 of the impugned Act gave large powers of management to the Mahant for the benefit of the institution. Sec. 47 (1) lays down how the rule of *Cypres* is to be applied and

15. A.I.R. 1954 Mad. 385, *Vide*
Commentary under Art. 25.

16. A.I.R. 1954 S.C. 388.
17. A.I.R. 1954 S.C. 400.

as the aggrieved party has been given a remedy by way of suit against the Commissioner's order of "diversion of funds" there is no reasonable ground for complaint.

In a Patna case¹⁸ it was pointed out that so long as the religious denomination or a section thereof administers its property in accordance with such law, as the State legislature has passed, that right should not be interfered with. The expression "law" in Art. 26 (d) should be construed to mean enacted law or State-made law and not to mean the principles of natural justice outside the realm of positive law.

There can be no arbitrary appointment of trustee without any lawful enquiry when an executive order seeks to eliminate persons entitled to administer under the deed of trust.¹⁹

Right to manage in matters of religion under Art. 26 is different from the right to practice religion under Art. 25.²⁰

In *Sudhindra Thirtha Swamiar v. Commissioner of H.R. and C. Endowments*²¹ it has been held that Sec. 52 (1) of the Madras Act XIX of 1951 as amended by Act XXVII of 1954 is *intra vires* inasmuch as the Commissioner or persons authorised by him can move the court to remove a Mattadhipathi only on any of the grounds mentioned in the Section. The grounds were reasonable restrictions. But it has been stated further that Rule 10 framed under Sec. 100 (2) of the Act imposes an unreasonable restriction on the right of the Mattadhipathi to manage the affairs of the Mutt. The restrictions are such as would bring the Mutt head to the level of a servant under the State Department. To standardise the conditions of the service in religious institutions including the Mutts may be a laudable attempt but the Government cannot claim that power in derogation of the Mattadhipathi's right of management of a denominational institution like a Mutt.²¹

The question whether educational institutions of a particular religious persuasion can impose restrictions on the practice of other religions by outward manifestations within the precincts of the college has been already discussed in our comments on Article 25.^{21a} Governmental power to inquire into the working of foreign missions, of their finance, of their propaganda machinery is quite legitimate in so far it relates to the maintenance of public order, health and morality.^{21b}

The Supreme Court in *Sri Venkâtrâmana Devaru v. State of Mysore*^{21c} has held that the expression "matters of religion" in Art. 26 (b) embraces not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, "not merely its Gnanam but also its Bhakti and Karma Kandas." Under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and how the worship is to be conducted are

18. *Baijaynanda v. State of Bihar*, A.I.R. 1954 Pat. 266.

19. *Narayan Pershad v. State of Hyderabad*, A.I.R. 1955 Hyd. 82.

20. *H.H. Sri Viswothama Thirtha Swamiar of Soda Mutt, Udipi v. State of Madras*, A.I.R. 1956 Mad. 541; 1956 (1) M.L.J. 125.

21. (1956) 1 M.L.J. 532; 69 M.L.W. 337.

21a *Sanjit Kumar Chaudhry v. Principal, St. Paul's College*, A.I.R. 1957 Cal. 524.

21b *Francis v. State of Madhya Pradesh*, (1957) M.P.L.J. 1 (Nag.), vide Comments under Art. 25.

21c A.I.R. 1958 S.C. 225; (1958) S.C.J. 382, relies on A.I.R. 1954 S.C. 282.

all matters of religion. This is also implicit in Art. 25. Exclusion of persons from a temple is a matter of religion with respect to the tenets of the institution. If the rights of trustees of a denominational temple founded for the benefit of Gowda Saraswath Brahmins, to exclude other communities from entering it for worship on the ground that it is a matter of religion within the protection of Art. 26 (b) have to be determined solely with reference to Art. 26 (b), then Sec. 3 of the Madras Temple Entry Authorization Act of 1947 should be held to be bad as infringing it. There is a fundamental distinction between excluding persons from temples open for purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation. The former will be hit by Art. 17 while the latter will be protected by Art. 26. The right of a denomination to wholly exclude members of the public from worshipping in the temple though comprised in Art. 26 (b) must yield to the overriding right declared by Art. 25 (2) (b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited to the members of the denomination, the question is not whether Art. 25 (2) (b) overrides the right so as to extinguish it, but whether it is possible so to regulate the rights of the persons protected by Art. 25 (2) (b) as to give effect to both the rights. Where after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why courts should not so construe Art. 25(2)(b) as to give effect to Art. 26 (b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected. The court held that in the instant case^{21c} it was proper that the Saraswath Brahmins might have the exclusive right on certain special occasions (*vide* our comments under Art. 25) while on other occasions the general Hindu public could exercise their right of worship.

The acquisition of a Devadayaminam under Sec. 3 of the Orissa Estates Abolition Act was held not to interfere with the right guaranteed under Art. 26 since the trust property only changed from immovable property to money.^{21d} The framing of a scheme under Sec. 93 of the T.C. Religious Endowments Act in respect of institutions falling within the definition of Sec. 61 (6) of the Act was held *intra vires* of Art. 26 (d), ^{21e}. The word "religion" in Art. 26 (b) includes not only the philosophical side but also the religious practices as laid down in the tenets of any religious sect. The Legislature is not competent to alter or modify religious practices sanctioned by a particular denomination. Of course, this is subject to certain limitations such as public order, morality or health ^{21f}.

Article 27.— No person shall be compelled to pay any taxes, Freedom as to payment of the proceeds of which are specifically Taxes for promotion of any appropriated in payment of expenses for particular Religion. the promotion or maintenance of any particular religion or religious denomination."

21d *Chintamani Pratihari v. State of Orissa*, A.I.R. 1958 Orissa 18: I.L.R. (1957) Cutt. 328.

21e *Jenardan Mallan v. The Cochin Devaswam Board*, A.I.R. 1957 T.C. 307 A.I.R. 1954 S.C. 282.

A.I.R. 1954 S.C. 388 followed.

23f. *Ramachandra Deb v. State of Orissa*, A.I.R. 1959 Or 5 relies on A.I.R. 1954 S.G. 282 and A.I.R. 1954 S.C. 388.

FOREIGN CONSTITUTIONS.

U.S.A.

The First Amendment (1791) sets down:

"The Congress shall make no law respecting establishment of religion."

Japan

Article 22 of the 1946 Constitution states:

" . . . No religious organization shall receive any privileges from the state, nor exercise any political authority."

Switzerland

Article 40 of the 1874 Constitution reads:

"No person may be compelled to pay taxes the proceeds of which are specially appropriated in payment of the purely religious expenses of any religious community of which he is not a member."

Rumania.

Section 27 of the 1948 Republican Constitution states:

"The different religions may be freely organized and practised. . . ."

Germany.

The 1949 Basic Law for the Federal Republic of Germany states in Sec. 4 :

1. Freedom of faith and conscience and Freedom of religious and ideological profession are inviolable.

2. The undisturbed practice of religion is guaranteed.

3. No one shall be forced to serve in wartime as a combatant against his conscience. The detailed rules shall be prescribed by federal legislation.

The German Democratic Republican Constitution of 1949 in Sec. 43 (4) says:

The religious societies in public law shall be entitled to levy taxes from their members on the basis of State taxation lists, subject to general provisions.

Section 45 (1) states:

"The forms of public support given to the religious societies in virtue of law, contract or special legal title shall be commuted by law."

COMMENTARY ON FOREIGN CONSTITUTIONS

By reason of the First Amendment, the U.S. Congress cannot make any grants to religious bodies or their educational institutions. In *Everson v. Board of Education*²² the question raised was if the provision by the local authorities for children attending public and Catholic schools to repay to parents the cost of transporting their children to and from school,—is this a matter affecting

22. 330 U.S. 1 (1947).

establishment of religion? If it was, then the Congress could not allow public money to be so spent for denominational schools. The majority of the judges held that paying bus fares was like providing policemen to protect all children at level crossings, or like using the fire department to extinguish a fire in a church and that therefore this could not be termed "establishment of religion" which alone, under the First Amendment, the Congress was enjoined not to legislate upon. But there is much to be said for the minority judgment in that case which said, "The unity of conception which bound together the secular and religious in the curriculum of the Catholic school has to be stressed.

Our principle of the neutrality of the State required not merely that the State keep its hands out of religion, but also that religion's hands be kept off the State and above all that bitter religious controversy be kept out of public life by denying to every denomination any advantage from setting control of public policy or public purse."²³

In *People of the State of Illinois ex Rel McCollum v. Board of Education*²⁴ the court struck down as unconstitutional a "released time" programme of religious instruction in the public schools. The Illinois statutes permitted such out of hours religious institutions to those pupils who elected to have moral lessons from teachers selected by local religious groups. The court held, "This use of the public school system to aid any or all religious faiths was inconsistent with the freedom of the 14th Amendment. The State was affording the use not only of its buildings but also of its compulsory school machinery as an aid to sectarian groups. . . . This is not separation of the Church and State."

The prohibition in the First Amendment does not prevent the State from exempting religious bodies from taxation, if the basis of the exemption is public welfare and not the religious character of the institutions.²⁵

The position of dominance of Catholics in the early progress of American education shows that their munificence and monetary help to public schools enthused them to urge for special treatment to their denominational schools. Cushman²⁶ says, "It is not surprising that Catholic citizens who had to pay taxes to support the public schools which they did not use, should try to secure some public aid for the parochial schools and they exerted a good deal of pressure to bring this about. Opposition to this was, however, bitter and widespread and by the end of the nineteenth century practically every State had adopted some kind of prohibition against the use of State funds for the support of religious education. In numerous cases the State courts held void attempts to extend direct or indirect aid to parochial schools. . . . Within the last twenty years new and varied services and benefits have been offered by the States to pupils in the public schools. These include free text books, free bus transportation, free benches and free medical service." The answer to the question if such aid could be extended to parochial schools was that the aid was for the child and not the school. In *Cochran v. Louisiana State Board of Education*²⁷ a State law was sustained authorizing the use of public funds to supply "school books to the school children of the State including not only public school children but also children in parochial and private non-sectarian schools." It was in this background that the

23. Vide Professor T.R. Powell's article on 'Public Rides to private Schools', *Harvard Educational Review*, Spring 1947.
24. 333 U.S. (1948).

25. *Everson v. Board of Education*, 330 U.S. 1 (1947).

26. 'Leading Constitutional Decisions', 9th Edn., p. 144-46.

27. (1930) 281 U.S. 370.

Everson case²⁸ and the McCollum case²⁹ were also decided. In *Pierce v. Society of Sisters*³⁰ a State law requiring all parents to send their children to public schools was struck down as it denied "due process of law" by taking from parents their freedom to "direct the upbringing and education" of their children.

In Everson's case it was held, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they adopt to teach or practise religion. Neither a State nor the Federal Government can openly or secretly, participate in the affairs of any religious organizations or group and *vice versa*."

Cooley defines taxes³¹ to be burdens or charges imposed by legislative authority upon persons or parents to raise money for public purposes. They are so levied by authority of law and by some rule of proportion which is intended to ensure uniformity of contribution and a just apportionment of the burdens of Government.

India.

Article 27 merely prohibits compulsory taxes which are used in whole or in part for the promotion or maintenance of any particular religion or religious denomination. No local authority can collect taxes from persons of all communities and use portion of it to aid instruction relating to any particular religion in educational institutions sponsored by certain denominations. It is not a question of the majority of the pupils belonging to particular religion.

The prohibition is aid to "any particular religion". If there is no particularization of religion and the benefit of state aid is extended to all religious institutions along with secular ones alike without any discrimination, there is no constitutional impropriety at all. The term "no person" means "no individual or corporation".

'Tax'.—In *Lakshmindra Thirtha Swamiar v. Commr. H.R.E., Madras*³² Sec. 76 (1) of the Madras H.R.E. Act XIX of 1951 which levied an annual contribution not exceeding five per centum of the income in view of services rendered by the Government and a further audit fees at one and a half per centum of its income, was declared *ultra vires* as it offended Art. 27. According to Professor Nicholson,³³ "A tax is a compulsory contribution of the wealth of a person or body of persons for the service of public powers." Cooley³⁴ states that "a tax is a contribution imposed by the state on individuals for the services of the state. . . . In its most enlarged sense the word 'taxes' embraces all the regular impositions made by Government upon the person, property, privileges, occupations and enjoyments of the people for the purposes of raising public revenues." In the instant case³⁵ the five per cent. levy was found to be a tax as the levy has no direct proportion to the benefit given to the institutions by the services of the State officers. Hence the tax is a real tax and not a mere levy for services rendered and since the tax was utilized for meeting a portion of the expenditure on the maintenance of the affairs of the religious institution. The Audit fees cannot be however treated as a tax.

28. 330 U.S. 1.

29. 333 U.S.: (1948).

30. 252 U.S. 239.

31. Cited in A.I.R. 1952 Mad. 613
*L. T. Swamiar v. Commr. H.R.E.,
Madras.*

32. A.I.R. 1952 Mad. 613: 1952 (1)

M.L.J. 557.

33. *Vide* 'Principles of Political Economy', Ch. VI Vol. III, p. 294.

34. 'Constitutional Limitations', p. 986 footnote.

35. A.I.R. 1952 Mad. 613.

Tax vis-a-vis Fee.—If the levy is out of all proportion to the service it is a tax. Otherwise it is only a fee, if it approximates to the cost of the actual service rendered.³⁶ Art. 27 gets attracted only when it is a tax and not if it is a fee. A tax has the following characteristics: (1) Compulsory contribution; (2) of the wealth of a person or body of persons; (3) it is a contribution imposed by the state (4) for the service of the public powers, (5) imposed by law and not by mere executive authority, (6) based upon some rule of proportion intended to ensure uniformity of contribution and a just apportionment of the burdens of Government.

To be a tax the levy collected must form part of the public revenues and must be used for whole public or for Government purposes. "But when you have a levy raised for a specific purpose, when you have that levy earmarked for a specific purpose and when that levy is taken for services rendered, then the levy is not a tax but a fee."³⁷

'Person'.—The other essential requirement in Art. 27 is that the tax must be levied on a person. Is an endowment a person? In *L. T. Swamiar v. Commr., H.R.E., Madras*,³⁸ the Madras High Court has held that in view of the provisions of Sec. 78 of the Act under which the obligation to discharge the liability under Sec. 76 fell upon the head of the religious institution, the tax was levied on a person. But the learned judges did not express any opinion as to whether a religious institution is a person.

Appropriation of Tax.—To attract Art. 27, the proceeds of the tax must be specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. A tax on Hindu religious institution will be void even though the appropriation is for the benefit of Hindu religious institutions.³⁷ To impeach the tax as void under this article it is not necessary for the person to be actually taxed. It is enough if there is in existence a legislation authorising such a tax. The person can then move for a declaration and a writ of prohibition.³⁷

In *Narayana v. State of T.C.*³⁹ it has been held that a legislature is entitled to impose a tax either directly or by delegated legislation. The circumstances that a particular impost is called a licence fee will not conclude the matter. If the impost is authorised the nomenclature given to it as a licence fee will not affect its validity. Levy of land revenue is now regarded as a tax levied by the sovereign power for public purposes.⁴⁰

The following tests will have to be satisfied before the contribution levied under the provisions of an enactment can be upheld as a fee within the competence of the State legislature :⁴¹

1. The levy can be justified as *intra vires* the State legislature only if it falls within the ambit of Entry 47 read with Entry 28 in List III of Sch. VII of the Constitution.

2. There should be *quid pro quo* basis to justify the levy as a fee. The correlation must exist both in the purpose of the levy and the extent of the

36. *Ratilal Panachand Ghandhi v. State of Bombay*, A.I.R. 1953 Bom. 242.

37. A.I.R. 1953 Bom. 242.

38. A.I.R. 1952 Mad. 613.

39. A.I.R. 1954 T.C. 504.

40. *Girijananda v. State of Assam*,

A.I.R. 1956 Ass. 33.

41. *Sudindhra Thirtha Swamiar v. The Commr., H.R.C., Endowments*, 1956 (1) M.L.J. 532: 63 M.L.W., 337 following A.I.R. 1954 S.C. 282.

levy, that is, the correlation should be between the actual levy and the expense incurred by the Government for rendering the services for which the levy is made.

3. The services rendered by the Government which constitutes the *quid pro quo* for the levy of the fee must be incidental to a system of regulation.

4. That the regulation itself must be solely on considerations of public interest, and

5. That the statutory regulation should not exceed the limits of a reasonable restriction on the fundamental rights guaranteed by the Constitution.⁴¹

Judicial Interpretation.

The Supreme Court held in *Ratilal v. State of Bombay*,⁴² "A tax is in the nature of a compulsory exaction of money by a public authority for public purposes. The imposition is made for public purpose to meet the general expenses of the state without reference to any special advantage to be conferred upon the payer of the tax. . . . Tax is a common burden and the only return which the tax-payer gets is a participation in the common benefits of the state. Fees are payments primarily in public interest but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always the element of *quid pro quo* which is absent in a tax. . . . In the first place a fee must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly, and in the second place, the amount collected must be earmarked to meet the expenses of rendering these services and must not go to the general revenue of the state to be spent for general public purposes. . . . It is not correct to say that as distinguished from taxation which is compulsory payment, the payment of fee is always voluntary, it being a matter of choice with individuals either to accept the service or not for which fees are to be paid."

In *Shri Jagannath Ramanuj Das v. State of Orissa*⁴³ it was held, "There is no generic difference between a tax and a fee. Both are different forms in which the taxing power of a state manifests itself. Our Constitution, however, has made a distinction between a tax and a fee for legislative purposes and while there are various forms of taxation, there is an entry at the end of each of these three lists as regards fees which could be levied in respect of every one of the matters contained therein." The distinctions between a tax and a fee as set out in *Ratilal's* case⁴⁴ are reiterated in the instant case.⁴⁵

In *Commissioner, H.R.E. v. L.T. Swamiam*⁴⁶ the main distinctions between a tax and a fee were elaborated and it was further stated, "What is forbidden by Art. 27 is the specific appropriation of proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The reason underlying this provision is that India being a secular state and there being freedom of religion guaranteed by the Constitution, both to individuals and groups, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denominations."

42. A.I.R. 1954 S.C. 388. A.I.R. 1954 S.C. 282 reiterated.

43. A.I.R. 1954 S.C. 400.

44. A.I.R. 1954 S.C. 242.

45. A.I.R. 1954 S.C. 400.

46. A.I.R. 1954 Madras 282.

Article 28.—(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

Freedom as to attendance at religious institution or instruction or religious worship in certain Educational institutions.

(2) Nothing in clause (1) shall apply to any educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or if such person is a minor his guardian, has given his consent thereto.

FOREIGN CONSTITUTIONS

Russia (U.S.S.R.)

Article 124 of the Constitution of the Soviet Russia (1936) states: "In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. is separated from the State and the school from the church."

Germany

Section 7 (2) and (3) of the 1949 Constitution of the Federal Republic of Germany provides:

2. The person responsible for bringing up children shall have the right to decide whether the child shall attend religious instruction.

3. Religious instruction shall be part of the curriculum in all public schools other than non-denominational schools. Religious instruction shall, subject to state supervision, be given in accordance with the principles of religious societies. No teacher shall be required against his will to give religious instruction.

Japan

Article XX of the 1946 Constitution states:

" The state and its organs shall refrain from religious education or any other religious activity."

Eire

Article 44 (2) of the 1937 Constitution says:

"Legislation providing State aid for schools shall not be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction in that school."

Rumania

Section 17 of the Constitution of the Republic states:

(1) Every person is free to perform the acts connected with any religious persuasions or the absence of religious persuasions. This right shall not, however, be exercised in a manner contrary to public order and morality. It shall not be permitted to be misused for non-religious ends.

(2) No person shall be constrained by direct or indirect means to take part in such acts.

Germany

Section 44 of the 1949 German Democratic Republic says:

(1) The right of the church to give religious instruction in school premises is guaranteed. The religious instruction shall be given by persons chosen by the church. No one shall be forced to give or prevented from giving religious instruction. The person responsible for the child's upbringing shall decide whether it shall attend religious instruction or not.

Sec. 46 (1) states:

In so far as there is need for divine services and spiritual ministrations in hospitals, prisons and other public establishments, the religious societies shall be allowed to perform acts of religion. No one shall be compelled to participate in such acts.

COMMENTARY ON FOREIGN CONSTITUTIONS.

In Russia the state is completely severed from the church and no religious instruction should be given in schools. In Germany the church can organize religious instruction in schools but the pupils cannot be forced to take it. In Rumania no one shall be constrained to take part in any religious activities. In Japan there is a prohibition against the state and its organs from taking part in religious education or in any other activity. In Eire a student is not to be compelled to attend religious classes.

In Burma the 1948 Constitution does not debar the state from imparting religious education but prohibits the abuse of religion for political purposes [Sec. 21 (4)] and guarantees that no religious instruction shall be compulsorily imposed on any minority (Sec. 22).

India.

This article (Art. 28) in effect summarises the position the Republican State of India has taken towards religious education. The attitude is one of *via media*, neither sponsoring religious education, nor banning it altogether. The Constitution-makers were aware of the exploitation of society under cover of religious cover. But they are also aware of the need for moral instruction to keep up the high Dharmic tone of the Indian masses with its ancient culture and civilization. The Republic of India is a secular State. In this context Art. 28 has been formulated to achieve the maximum of results.

Article, 28 Clause (1).—This clause provides that State shall not impart religious instruction in any educational institution which is wholly maintained by State funds. This means if the funds are partly of the state and partly other sources private in nature, there is no such ban. Again there is no ban on mere general "moral instruction" which does not come under denominational religion. In fact Art. 45 enjoins a directive for compulsory primary education in which even moral instruction is indeed very necessary for infants in their formative years. State aid means aid from any organ of the state as outlined in Art. 12.

Article 28, Clause (2).—Even where the state administers an educational institution but the funds are drawn from an endowment or trust then if the latter directs imparting of religious instruction, the state shall arrange the same. Clause (2) is not exactly an exception to clause (1) since the latter speaks of completely state-owned institutions while the former is state-administered with trust funds.

The Banaras Hindu University is one such trust administered by the state. It will be a breach of trust if the state does not carry out the moral directives in the trust.

Article 28, Clause (3).—This applies to a third category called state-aided institutions. Institutions which receive even a small grant from the state or which are given state recognition, should not compel any person attending the institution to attend classes for religious instruction or religious worship.

So aided institutions can give religious instruction. Article 29 indirectly dilutes the effect of denominational institutions. Once they get state recognition or state aid they cannot refuse to admit members of other communities or persuasions. Once this is done the exclusive character of the institution is lost. Pupils of other communities are under no obligation to take the religious instruction imparted.

Then again, even in institutions wholly maintained by the state as under Art, 28 Cl. (1), the question may arise if outside agencies may organize religious instructions to the pupils in out-of-class hours. Clause (1) would seem to emphasise "the instruction" and so even such outside attempt is taboo if the instruction is to be given within the premises of the institution. There appears to be no ban, however, in respect of moral lessons generally applicable to humanity without any denominational tinge. Such moral lessons may be given by the state itself or by organized outside agency out-of-class hours.

It is needful to emphasise that a secular state is not an atheistic state. In fact, in such a state is founded the moral bases of society, to foster which it is imperative that the state should help all forces that tend to help the strengthening of the moral background of the state. Law, public order, justice are all to be nourished fostered and built only in this moral background. Unless the citizens of a state of high calibre, the above fundamentals of orderly and civilized life get jeopardized. Hence it is almost a positive duty on the part of the state to help in the moral armament of its citizens. In fact, such armament is necessary for the very existence of the State and progress on the right lines.

Such an aim could be achieved only by the State giving free scope for religious instruction in all institutions to the extent possible. If the institution is wholly state-owned even then the state should organize "moral lessons" instead of "religious lessons". The former may include non-controversial basic truths of all religions. The taboo against religion in state schools is merely to indicate that the state holds the balance equal as between all religions and would not sponsor one at the cost of another religion. This concept is wholesome as otherwise disturbances and civil war will result. For verily religion is the first policeman of society. Remove religion, temples etc., you will find unrestrained fanaticism on the increase. Disorder and unrest will be the result. But the bed-rock of human civilization rests only on moral foundations. Hence to this extent the state shall foster moral education to children and youths in their formative years as the youth of today are the citizens of

tomorrow. One may go to the extent of stating that the community or even denominational organizations should be encouraged to give organized religious education to students out-of-school hours in all educational institutions—state-owned, or state-aided or private-owned. No student should, however, be compelled to take part in it. This would enable all students to choose their own classes for denominational religious education. A beginning in this direction may however be made. The success of the Christian missionary educational institutions in the moral field is entirely due to this aspect of moral instruction. There is a growing feeling that if other religions do not similarly organize youths may fail to know the good in their own religions and will become a prey to proselytization in their teens. A good knowledge of the basic truths of one's own religion is ever so helpful in valuing the good in other religions. To foster this critical frame of mind it is imperative that all denominations should organize their own moral instructions in the out-of-class hours of the several educational institutions. The state also should impart general non-denominational moral instruction on an approved non-controversial syllabus.

It may be noted that while Art. 28 ensures that no student is compelled to attend any religious instruction against his will or that of his parents, Art. 29 stipulates that no student shall be denied admission merely on the ground of religion. Article 28 refers only to religious instruction, not to moral instruction as such.⁴⁷ Hence there is sufficient scope for all the institutions to utilize this "moral forum" to develop the best in the youth without yoking him to any denominational doctrine. The prohibition in Art. 28 is to ensure that the state is neutral in the matter of religion. Beyond the prohibitions of Arts. 27 and 28 and the guarantee in Arts. 25 and 26 there is no general prohibition against legislation in respect of "establishment of religion."⁴⁷ There is thus no such wall of separation between church and state in India as obtains in the U.S.A.⁴⁷

⁴⁷. *Kidongazi Manakal Narayanan Nambudripad v. State of Madras*,

A.I.R. 1954 S.C. 385.

CHAPTER VIII

CULTURAL AND EDUCATIONAL RIGHTS

Article 29.—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

FOREIGN CONSTITUTIONS

Burma.

Article 22 of the 1948 Constitution provides.

“No minority, religious, racial or linguistic, shall be discriminated against in regard to admission into state educational institutions.”

Russia (U.S.S.R.)

Article 121 of the Soviet Constitution states:

Citizens of the U.S.S.R. have the right to education.

This right is ensured by universal and compulsory elementary education, by free education up to and including the seventh grade; by a system of state stipends for students of higher educational establishments who excel in their studies; by instruction in schools being conducted in the native language and by organization in the factories, state farms, machine and tractor stations, and collective farms of free vocational, technical and agronomic training of the working people.

Rumania.

Section 22 of the Constitution states:

In the Rumanian People's Republic all citizens have the right to education.

The state provides for the exercise of this right by organizing and developing compulsory free primary education by granting state scholarships to meritorious pupils and students, and by organizing and developing vocational and technical education.

Section 23 states:

The state encourages and supports the development of science and art, and organizes research institutes, libraries, publishing houses, theatres, museums and musical academies.

Czechoslovakia.

Section 12 of the 1948 Constitution says:

1. All citizens have the right to education.
2. The state takes care to ensure that every person receives education and training in accordance with his abilities and having regard to the needs of the community.

Section 13:

1. All schools are state schools.
2. Elementary education is uniform, compulsory and free.

Section: 14:

1. All education and instruction shall be so arranged as to be in harmony with the results of scientific research and compatible with the popular democratic order.

Section 19:

Freedom to engage in creative mental activity is guaranteed. Scientific research and publication of its results and likewise art and its expressions are free in so far as they do not violate the penal law.

2. Cultural assets are under the protection of the state. The state ensures that they are accessible to all and supports science and art in the interests of the cultural development of the nation, progress and the general welfare. In particular it takes care that creative workers are assured of favourable conditions for their work.

Germany.

Section 5 (3) of the 1949 Constitution of the Federal Republic enunciates:

Art and science, research and teaching are unrestricted. The freedom to teach does not release the teacher from his duty to be loyal to the Constitution.

Section 7:

1. The whole educational system shall be under the supervision of the state.
2. The right to establish private schools is guaranteed.

Costa Rica.

Section 77 of the 1949 Constitution states:

Public education shall be organized as a complete process in which the various levels are correlated, from the pre-school stage to the University.

Section 78:

Primary education is compulsory; primary, pre-school and secondary education are free and are provided at national expense.

The state shall facilitate the higher studies of persons who lack the necessary funds.

Section 79:

Freedom of education is guaranteed provided that every private teaching shall be subject to state inspection.

Section 80:

Private initiative in educational matters shall receive state encouragement in the manner prescribed by law.

Section 87:

Freedom of teaching is a fundamental principle of university education.

Section 89:

The cultural aims of the Republic include the protection of natural beauty, the preservation and extension of the historic and artistic inheritance of the Nation and support of private initiative for scientific and artistic progress.

COMMENTARY ON FOREIGN CONSTITUTIONS

The guarantee of freedom for imparting education and preserving cultural rights of all is present in the various constitutions outlined above. In Costa Rica the state is enjoined to aid the higher studies of poor students. In Germany art, science, research and teaching are unrestricted. In Burma discrimination against any minority group, religious, racial or linguistic, is prohibited.

Mr. Justice McReynolds in *Meyer v. Nebraska*⁴⁸ stated: "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declared, 'Religion, morality and knowledge being necessary to good Government and the happiness of mankind, schools and the means of education shall for ever be encouraged'. Corresponding to the right of control it is the natural duty of the parent to give his children education suitable to their station in life."

It was held to be unconstitutional to compel children to attend only public schools.⁴⁹ That would be interfering with the liberty of parents and guardians in the matter of upbringing and education of children under their control. In the words of the Justice McReynolds, "The child is not the mere creature of the state. Those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations. . . . The fundamental theory of liberty upon which all Governments in this Union repose excludes any general power of the state to standardise its children by forcing them to accept instruction from public teachers only."

The right of non-discrimination on the ground of religion is personal and cannot be defeated by applying it to a class as such, giving it to a few and denying it to others on some fallacious pretext or other. Thus Hughes, C.J., observed in *Missouri Ex rel Gaines v. Canada*.⁵⁰ "Here the petitioner's right is a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the state was bound to furnish him within its borders facilities for legal education substantially equal to those which the state there afforded for persons of the White Race, whether or not other Negroes sought the same opportunity."

48. (1922) 262 U.S. 390: 67 Law Ed. 1042.

49. *Pierce v. Society of Sisters Holy Names*, 268 U.S. 510.

50. (1938) 305 U.S. 337: 89 Law Ed. 208. See also *McCabe v. Atchison*, (1914) 235 U.S. 151: 59 Law Ed. 169.

India.

Article 29 Clause (1) assures citizens of India that their personal script, language and culture shall be preserved even if they are of a minority group. No other group, even if it be the majority in the country, shall impose its own language, script or culture on the minorities.

Clause (2) guarantees equal treatment to all citizens in the matter of admission to educational institutions maintained by States or receiving state aid. There can be the test of merit but grounds such as religion, race, caste, language or any of them will have no place in the test. This right is individual to the citizen as such and it is not a right extended to him as a member of his community⁵¹. In other words, even if other members of his community are admitted, it is no answer to the individual's case. But this right is dependent on the common factor of the requisite educational academic qualifications. Provided he has such qualification which is in no way inferior to the other aspirants, the bar of admission cannot arise only on factors such as religion, race, caste and language. The emphasis is on the word "only" and on the categories outlined in clause (2). This shows that limitations may be visited on other grounds such as physical fitness, vaccination, age, previous training, disassociation from injurious associations etc.⁵². "Sex" and "place of birth" which are present in Art. 15 are absent in Art. 29. This would appear to indicate that there can be educational institutions only for men or only women without violating the Constitution.

Constitutional Amendment. The first Constitution Amendment Act, 1951, inserted a new clause 4 in Art. 15 thereby affecting Art. 29 also. The new clause 4 of Art. 15 runs:

"Nothing in this Article or clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

This amendment was consequent on the decision of the Supreme Court⁵³ declaring the Madras Communal G.O. to be *ultra vires* as it discriminated in admissions by fixing a certain quota communitywise. The Constitution Amendment does not change the law at all from the position enunciated in Champakam's case⁵⁴ but only empowers the state to make a special provision for—

- (1) any socially and educationally backward classes of citizens,
- (2) Scheduled Castes,
- (3) and Scheduled Tribes.

The Madras Government has therefore now fixed a reservation of 15 per centum of seats to the Scheduled Castes and Tribes while 25 per centum is for the socially and educationally backward classes. The word is "class" and not caste. So any particular group in any caste if it is generally backward socially and educationally, can be specially provided for by the state. The backward class may be among some backward Brahmins, or backward Kshatriyas, or other castes. It is a question of fact, and there is no caste

51. *State of Madras v. Champakam*, (1951) S.C.J. 313.

52. *Champakam v. State of Madras*, (1950) 2 M.L.J. 427.

53. *State of Madras v. Champakam*, (1951) S.C.J. 313.

54. See Footnotes No. 53.

as such which can be termed backward. In one caste some may be backward while the rest may be very advanced.

The view once taken by Somasundaram, J., in *Champakam v. State of Madras*⁵⁵ to the effect that because of Art. 37, Art. 45 was an exception to Art. 29 (2) is no longer good law as it is deemed to have been overruled by the Supreme Court⁵⁶.

It is noteworthy that the guarantee in Art. 29 is only to a citizen and not to a non-citizen. But this is not harmonious with Art. 14 which assures equal protection of laws to all "persons". Person includes non-citizens also. But Art. 29 is the direct specific article dealing with the matter and so it cannot be really governed by the general provision in Art. 14.

The imposition of "Hindi" on the Tamils as a compulsory measure is unconstitutional under Art. 29 (1) but if it is only permissive and recommendatory there can be no objection whatsoever.

Judicial Interpretation.

Merely because Hindu students are to be admitted in a Christian institution there is no right extended to such students to insist on permission to celebrate Saraswati Pooja and worship in the college⁵⁷.

The leading case is *State of Madras v. Shrimati Champakam Devarajam* (1951) S.C.R. 525 on appeal from the Madras judgment in A.I.R. 1951 Mad. 120. In *Om Prakash v. State of Punjab*⁵⁸ it was enunciated that in the matter of admission race, caste, religion, language or any of them cannot be the basis of selection though other grounds can be considered.

In *Romesh Chandra v. Principal, B. B. I. College*⁵⁹ it has been held that the Principal's action in the name of discipline in refusing admission to an expelled student cannot be questioned. In *Anjali Roy v. State of West Bengal*⁶⁰ the refusal to admit a girl on the ground of sex was not *ultra vires* per Art. 15 since Art. 29 omits this category.

In *Champakam's* case⁶¹ the majority view of the Madras High Court held. "The notification G.O. No. 1254 Education, dated 17th September, 1948, commonly known as Communal G.O., which restricts the number of seats in certain Governmental Colleges for certain castes goes directly against the provisions of Art. 15 (1) and Art. 29 (2) and cannot be justified also under Art. 46 The right given by Art. 29 (2) is personal and individual right as citizens and not as members of a particular religion or caste, *vide* (1938). 305 U.S. 337, *Missouri Ex rel Gaines v. Cannada*. As one of the objectives of the Constitution is to provide for the uplift of backward and weaker sections of the people which *inter alia* is embodied in Art. 46, the state is at liberty to do anything to achieve that object, so long as no provision of the Constitution is contravened and no fundamental right declared by the Constitution is infringed or impaired. When, however, there is no such provision regarding admission to educational institutions the Courts are not justified in adding a new provision by way of an exception to the express declaration in Articles

55. See footnotes 51-54.

56. *Vide Om Prakash v. State of Punjab*, A.I.R. 1951 Punjab 93.

57. *Sanjib Kumar Chaudry v. Principal, St. Paul's College*, 61 C.W. N. 717.

58. A.I.R. 1951 Pun. 9.

59. 1952 A.L.J. 731; 1952 A.W.R. (H.C.) 587.

60. 56 C.W.N. 801.

61. A.I.R. 1951 Mad. 20. *Ibid.*, in appeal A.I.R. 1951 S.C. 226.

15 and 29 (2). Article 46, therefore, cannot override the provisions of these two Articles or justify any law or act of state contravening these provisions".

Somasundaram, J., however, in his judgment stated, "It cannot be urged that Arts. 15 (1) and 29 (2) are unqualified from the omission of a clause like Art. 16 (4) in those Articles. Article 16 (4) gives effect only to the fundamental principle contained in Art. 46. Article 29 (2) was passed after Art. 46 and the omission of a clause similar to Art. 16 (4) does not preclude the state from giving effect to the principle contained in Art. 46, which they are bound to".

It will be seen that the amendment to Art. 15 in the shape of the new Clause (4) resolves the difficulty by specially providing for backward classes. This was done in answer to the Supreme Court's decision in *Champakam's* case, where the court said. "The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order except to the extent provided in the appropriate Article in Part III. The Directive Principles of State Policy (Art. 46) cannot override the provisions found in Part III but have to conform and run as subsidiary to the chapter of Fundamental Rights."

The amendment of Art. 15 now enables reservations to the (1) socially and educationally backward classes, (2) Scheduled Castes, (3) Scheduled Tribes. No longer can the state reserve seats according to communities. As we have elaborated in our commentary on the Directive Principles in subsequent pages, the Directive Principle are in no way subordinate to the fundamental rights nor *vice versa*. Each is big in its own sphere. While the former are binding on the Government in its legislative and executive aspects, the latter are sacrosanct in the sphere of justiciability. But the effort must be to harmonize the two. If the change of society, consequent on the application of the Directive Principles of State Policy, requires modification of the fundamental rights, there has necessarily to be an amendment of the Constitution. That is why we have had an amendment of Art. 15 [in 15 (4)] as detailed above so that Arts. 15, 29 (2), 16 (4) and Art. 46 could be harmoniously interpreted.

In *Romesh Chandra Chaube v. Principal Bipan Behari, Intermediate College, Jhansi*,⁶² the Allahabad High Court has held that there is no guarantee in the Constitution that a student studying in any institution has a right to continue his education in that particular institution even when he may not be acceptable to the authorities of the institution in the interests of good discipline. Such an action of the Principal is not hit by Art. 29 (2).

In *Rustom E. Mody Parsi v. State of M.B.*⁶³ it has been held that the fundamental right bearing on the subject of admission to an educational institution run or aided by state funds will only arise on a denial of admission on the grounds of religion, race, caste, language or any of them. Hence if denial of admission proceeds on any other ground (such as residence or non-residence in a State) no right arises.

In the *University of Madras v. Shanta Bai*⁶⁴ it has been held that the University of Madras is not a "state" as defined in Art. 12 and its regulations are not therefore subject to the prohibition in Art. 15 (1). Admission to colleges is regulated by Art. 29 (2) and the regulations of the University requiring that

62. A.I.R. 1953 All. 90.

63. A.I.R. 1954 M.B. 119.

64. A.I.R. 1954 Mad. 67.

colleges should provide certain facilities for women before they could be admitted are not discriminatory on the ground of sex. The true scope of Art. 15 (3) is that notwithstanding Art. 15 (1), it will be lawful for the state to establish educational institutions solely for women and that the exclusion of men students from such institutions would not contravene Art. 15 (1). That is not inconsistent with the authorities of educational institutions not failing within Art. 15 (3) from being clothed with power to admit or exclude women students from these institutions. The combined effect of both Articles 15 (3) and 29 (2) is that while men students have no right of admission to women's colleges the right of women to admission in other colleges is a matter within the regulation of the authorities of these colleges. Article 29 (2) is a special article and is the controlling provision when the question relates to admission to colleges.

In an Hyderabad case⁶⁵ it has been held that the discretion of the college authorities in the admission of students cannot be questioned unless it is *mala fide* and against the prescribed rules or cannot the rules themselves run counter to a fundamental right on the ground of gross discrimination. The student has, therefore, no inherent right to be admitted. The court would not wrench the discretion of the selecting authorities nor interrupt them in the proper exercise of it.

In *Bombay Education Society v. State of Bombay*⁶⁶ an important aspect of Art. 29 was raised. On 6th Jan. 1954, the Government of Bombay issued a circular directing that "no primary or secondary school shall from the date of these orders admit to a class where English is used as a medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English, namely Anglo-Indians and citizens of non-Asiatic descent." This circular had an adverse effect on the strength of the school as children other than Anglo-Indian could not benefit by the school. It was held by the Bombay High Court that although the grounds on which the State based the circular might not be grounds of religion, race or caste, still the effect of the circular was to deprive the citizens of their right only on the grounds mentioned in Art. 29 (2). (A.I.R. 1951 S.C. 226 relied on). It was further held that on the face of the proviso to Art. 337 the state was asking the Anglo-Indian school not only not to make available 40 per cent of the annual admissions reserved for non-Anglo-Indians but to prohibit any non-Anglo-Indian from entering the school. The circular thus contravened both Art. 29 (2) and Art. 337. The only two conditions that are necessary for the operation of Art. 29 (2) are that it must be an institution maintained by the state and it must receive aid out of state funds. Therefore, when there is such an educational institution, the right of the citizen to admission to that school arises and that right cannot be defeated only on the ground that he belongs to a particular religion, race, caste or speaks a particular language.

In appeal the Supreme Court⁶⁷ held that the word "namely" in the impugned circular imports enumeration of what was contained in the preceding clause. Hence it could not be contended that the clause did not limit admission only to Anglo-Indians and citizens of non-Asian descent, but permitted admission of pupils belonging to any other section of citizens the language of which is English.

65. *Vikaruddin v. Osmania University*, A.I.R. 1954 Hyd. 25.

66. A.I.R. 1954 Bom. 468.

67. *State of Bombay v. Bombay Education Society and Others*, A.I.R. 1954 S.C. 561.

The court further held that granting the object of the order was to promote advancement of the national language, that object was sought to be achieved by denying to all pupils, whose mother tongue was not English, admission to any school where the medium of instruction was English. Article 29 (2) is not limited to citizens belonging to a minority group other than the section or the minorities referred to in Art. 29 (1) or Art. 30 (1), for citizens who do not belong to any minority group may quite conceivably need this protection just as much as the citizens of such other minority group. Article 15 protects all citizens against the state whereas the protection of Art. 29 (2) extends against the state or any body who denies the right conferred by it. Further, Art. 15 protects all citizens against discrimination generally, but Art. 29 (2) is a protection against a particular species of wrong, namely, denial of admission to educational institutions of the specified kind. In the next place, Art. 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29 (2) confers a special right on citizens for admission to educational institutions maintained or aided by the state. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights or the nature of a right to be admitted to an educational institution for the maintenance of which they make contribution by way of taxes. There is no cogent reason for such discrimination.

The marginal note alone cannot be read as controlling the plain meaning of the language in which Art. 29 (2) has been couched.

It may be further urged that to deny a parent to choose his own forum for imparting education to his children, is to deny an inherent right. A non-Anglo-Indian should not be denied facilities for learning through the English medium.

When a minority like the Anglo-Indian Community, which is based, *inter alia*, on religion and language, has the fundamental right to conserve its language, script and culture under Art. 29 (2) and has the right to establish and administer educational institutions of their choice under Art. 30 (2), surely then there must be implicit in such fundamental right the right to impart instruction in their own institutions to the children of their own community in their own language. To hold otherwise will be to deprive Art. 29 (1) and Art. 30 (1) of the greater part of their contents. Such being the fundamental right the police power of the state to determine the medium of instruction must yield to this fundamental right to the extent it is necessary to give effect to it and cannot be permitted to run counter to it.

A language test in Oriya for all entrants to Government service in Orissa is not repugnant to Art. 15, 16 or 29. Article 29 gives ample scope for fostering the regional language.⁶⁸

Merely because Hindu students are to be admitted in a Christian institution there is no right extended to such students to insist on permission to celebrate Saraswati Pooja and worship in the college.⁶⁹

68. *P. Raghunadha Rao v. State of Orissa*, A.I.R. 1955 Orissa 113.

69. *Sanjib Kumar Chaudhry v. Prin-*

cipal, St. Paul's College, 61 C.W.N. 717. *Vide* Commentary on Art. 25.

In *Raghuramulu v. State of Andhra Pradesh*⁷⁰ a G.O. which fixed that a maximum of 15 per centum of the seats in any faculty be reserved for the backward classes, was questioned as not in the interests of that very class as there were more than that number aspiring for educational facilities from the backward classes. It was held that the rule need not be held bad but it would be enough to confine the operation of that rule to a case where the assumption underlying that rule applied and to hold that in other cases where the rule did not operate for the advancement of the backward classes the fundamental right of a citizen of that class was unaffected by the provisions.

The distribution of seats in colleges between two areas of a state is not on the basis of birth of the candidates but of their domicile, their place of residence. It may be noted that Art. 15 (1) prohibits discrimination on grounds *inter alia* of 'place of birth'. These are significantly omitted in Art. 29. Otherwise in backward areas residents of that place may be denied educational facilities if preference was not shown to them⁷¹.

It is open to the State Government to impose regulations with regard to maintenance of discipline or standard or efficiency even as regards schools run by religious minorities. It is also open to it to withdraw recognition or grants-in-aid if teachers take part in seditious agitation or if there is danger to public order, or morality or health. The constitutional protection under Arts. 29 and 30 is not, therefore, absolute and it does not involve dispensation from obedience to general regulation made by the state for promoting the common good of the community.⁷² In the instant case, however, the action of the Government in imposing the *ad hoc* committee having complete power to control and management and divesting the trustees of it, transcends these limitations and infringes the constitutional protection under Arts. 29 and 30.⁷²

A minority community can effectively conserve its language, script or culture by and through educational institutions and this right which is vouchsafed under Art. 30 (1) is subject to Art. 29 (2).⁷³

Article 30.—(1) All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

FOREIGN CONSTITUTIONS

Eire.

Article 42 (3) of the 1937 Constitution provides:

"The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State or to any particular type of school designated by the State."

70. (1957) 2 Andh. W.R. 416: 1957 Andh. L.T. 763.

71. *Joseph Thomas v. State of Kerala*, A.I.R. 1958 Ker. 33: 1957 Ker. L.T. 971, relies on A.I.R. 1957 S.C. 334.

72. *Pratinidhi Sabha v. State of Bihar*, A.I.R. 1958 Pat. 359.

73. *In re The Kerala Education Bill 1957*, A.I.R. 1958 S.C. 956: 1958 Ker. L.T. 465.

Article 44 (4) states :

"Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations."

Rumania.

Section 24 of the 1948 Constitution states:

In the Rumanian People's Republic, the right of using their native language and of organizing education at all levels in the said language is guaranteed to the other nationalities living side by side with the Rumanian people.

Canada.

In the Canadian Constitution it is stated in Sec. 93 that in and for each province, the legislature may exclusively make laws in relation to education, subject to and according to the following provisions:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union.

(2) All the powers, privileges and duties at the Union by law conferred and imposed in upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

India.

Article 30 is the counterpart to Art. 26 and while the latter guarantees the minorities the right to maintain religious and charitable institutions, the former guarantees the right to establish its own educational institutions. Article 30 is complementary to Art. 29 (1) which also aims at safeguarding the minorities' language, script, culture, etc. The latter has to be achieved by only allowing educational institutions to be run under the aegis of the concerned minority. The right to study and choose the school is left to the individual. The state cannot dictate it. Thus under Art. 45 there cannot be free and compulsory education only in state schools. It has to be extended to all schools. There cannot be a general power as stated in *Pierce v. Society of Sisters*,⁷⁴ a general power in the central authority of the Federal Government "to standardize its children by forcing them to accept instruction from public teachers only".

Clause 2 enunciates the same principle of non-discrimination in respect of state aid. The aid has to be extended to all institutions alike, managed by any minority, religious or linguistic.

Judicial Interpretation.

Christian institutions meant primarily for the propagation of Christian religion and secondarily for rendering humanitarian services are well within the bounds of law. The conditions imposed should not offend public order, morality or health. Nor can there be any compulsion on anyone to practise or profess the Christian religion.⁷⁵ But it can lay down that within the institution no other outward manifestations of other religions be practised.⁷⁵

74. (1925) 268 U.S. 510.

75. *Sanjib Kumar Chaudhury v.*

Principal, St. Paul's College, 61 C.W.N. 717; A.I.R. 1957 Cal. 524.

In *Ramani Kanta v. Gauhati University*⁷⁶ it was held, "In order to bring the case under the first part of Art. 30 a minority community has to establish its character first as a religious or linguistic minority. It is then to show that an institution was established by it and it will then follow that it will have the right to administer the educational institution according to its choice. Where all that is said is that a college is to all intents and purposes a minority college, it would not bring the case under Art. 30, for there is no statement that it was a college established by a minority. Without establishing the college, a minority cannot claim the right to administer it."

It has been held by the Supreme Court in a recent case⁷⁷ that where a minority has the right to establish and administer educational institutions of their choice under Art. 30 (1), it is clear that there is implicit in such a fundamental right the right to impart instruction in their own institutions to the children of their own community in their own language.

The Bombay High Court has also held on the same case⁷⁸ that the minority must not be fettered in the administration of their schools. The institution must be of their own choice. It is not open to the state to dictate to a minority what the nature of its educational institution should be. It is for the minority itself to decide through what educational institution it would be able to conserve the rights given to it under Art. 29 (1).

The Calcutta High Court held that while non-Christians have a right to be admitted into colleges run by Christian endowments on Christian lines, yet the former cannot claim a right to show external manifestations of their own faith by celebrating Saraswati Puja within the precincts of the college.^{78a}

In *re Kerala Education Bill*,⁷⁹ already referred to in this Commentary under Art. 14, the Supreme Court posed the question as to whether clause 3 (5), clause 8 (3) and clauses 9 to 13 of the Bill offended Art. 30 and answered (by a majority opinion) that they did offend, so far as Anglo-Indian educational institutions entitled to grant under Art. 337 were concerned. As regards other minorities not entitled to grant as of right under any of the express provisions of the Constitution, but were in receipt of aid or desired such aid and also as regards Anglo-Indian educational institutions in so far as they were receiving aid in excess of what were due to them under Art. 337, clauses 8 (3) and 9 to 13 did not offend Art. 30 (1). But clause 3 (5) in so far as it made such educational institutions subject to clauses 14 and 15 offended Art. 30 (1). Also clause 7, except sub-clauses (1) and (3) which applied only to aided schools, and clause 10 in so far as they applied to recognised schools to be established after the said Bill comes into force did not offend Art. 30 (1). It was also held that cl. 3 (5) in so far as it made new schools established after the commencement of the Bill subject to cl. 20 did offend Art. 30 (1). The court said, "The minorities evidently desired that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. . . . There is, no doubt, no such

76. A.I.R. 1951 Assam 163.

77. *State of Bombay v. Bombay Education Society*, A.I.R. 1954 S.C. 561.

78. *Bombay Education Society v. State of Bombay*, A.I.R. 1954 Bom. 468.

78a. *Sanjib Kumar Choudhury v. Principal, St. Paul's College*, A.I.R. 1957 Cal. 524: 61 C.W.N.

717 *Vide* Commentary under Art. 25.

79. A.I.R. 1958 S.C. 956. *See* Provisions of the Bill for appreciating the decision. *Vide* Dissenting opinion of Venkataramier, J., who held that except Cls. 14 and 15, the other provisions of the Bill did not offend Art. 30 (1).

thing as fundamental right to recognition by the state but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional rights of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Art. 30 (1). The legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law. . . . The provisions of sub-clauses 2, 4 to 9 of cl. 7 and cl. 10 may be accepted as permissible regulations but it is difficult to treat cl. 20 as merely regulatory. That clause peremptorily requires that no fees should be charged for tuition in the primary classes. If this Bill becomes law, all these schools will have to forego this fruitful source of income. . . . Therefore, the imposition of such restriction against the collection of fees from any pupil in the primary classes as a condition for recognition will in effect make it impossible for an educational institution established by a minority community being carried on."

As to what is a minority community the Supreme Court said, "Where a Bill passed by a State legislature refers to the whole of the State, the minority for purposes of Arts. 29 and 30 must be determined by reference to the entire population of that state. By this test so far as the Kerala Education Bill, 1957, is concerned, Christians, Muslims and Anglo-Indians will be minorities in the State of Kerala. . . . A minority community can effectively conserve its language, script or culture by and through educational institutions, and therefore the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script, or culture and that is what is conferred on all minorities under Art. 30 (1). This right, however, is subject to cl. (2) of Art. 29 which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

The language covered in Art. 30 (1) is wide enough to cover both the pre-Constitution and post-Constitution institutions. Article 30 (1) recognises the right of the minorities to (a) establish and (b) to administer educational institutions of their choice. The second right clearly covers pre-Constitution schools.⁷⁹ The real import of Art. 29 (2) and Art. 30 (1) is that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution.

Article 30 (1) benefits not only religious minorities but also linguistic minorities. Both these minorities have the right to establish and administer educational institutions of their choice for teaching either their religion or their language. But the constitutional right to administer an educational institution of their choice, does not necessarily militate against the claim of the state to insist that in order to grant aid the state may prescribe reasonable regulations to ensure the excellence of the institutions to be aided. Reasonable regulations may certainly be imposed by the state as a condition for aid or even for recognition.

CHAPTER IX

RIGHT TO PROPERTY

Article 31.—(1) No person shall be deprived of his property
Compulsory acquisition of save by authority of law.
property.

¹[(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which, compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2-A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property notwithstanding that it deprives any person of his property].

(3) No such law as is referred to in clause (2) made by the legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the legislature of a State has, after it has been passed by such legislature, been reserved for the consideration of the President and has received his assent, then notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or any penalty, or

- (ii) for the promotion of public health or the prevention of danger to life or property, or
- (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country or otherwise with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification, and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this Article or has contravened the provisions of sub-section (2) of the Sec. 299 of the Government of India Act, 1935.

The Fourth Constitution Amendment.

The Fourth Constitution Amendment Act ² which received the President's assent on 27th April, 1955 substituted the above clauses (2) and (2-A) for the following clause (2) in Art. 31 as it originally stood before the amendment.

(2) No property movable or immovable including any interest in, or in any company owing any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which the compensation is to be determined and given.

Clause (1)

FOREIGN CONSTITUTIONS.

The U. S. A.

The Fifth Amendment says:

"Nor shall any person be deprived of . . . property without due process of law."

The Fourteenth Amendment (1868) postulates a similar prohibition upon the State.

Eire.

Art. 43 of the 1937 Constitution postulates:

"1. (i) The State acknowledges that man, in virtue of his rational being, has the natural right antecedent to positive law, to the private ownership of external goods.

² Published in the Gazette of India, Extraordinary, Part II Sec. 1,

page 183 dated 28th April, 1955.

"(ii) The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

"2. (i) The State recognizes, however, that the exercise of the rights mentioned in the foregoing provisions of this article ought, in civil society, to be regulated by the principles of social justice.

"(ii) The State, accordingly may, as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

Japan.

Art. 29 of the 1946 Constitution states:

"The right to own property is inviolable but property rights shall be defined by law in conformity with the public welfare."

Art. 30 says:

"The people are liable to taxation as fixed by law."

Burma.

Clauses 1-3 of Art. 23 of the 1948 Constitution states:

"1. Subject to the provisions of this section, the State guarantees the right of private initiative in economic sphere.

"2. No person shall be permitted to use the right of private property to the detriment of the general public.

"3. Private monopolist organisations such as cartels, syndicates and trusts formed for the purpose of dictating prices of or for monopolizing the market or otherwise calculated to injure the interests of the national economy are forbidden."

France.

The preamble of the Constitution of the Fourth French Republic of 1946, affirms and adopts the Declaration of Rights of 1789. Clause 17 of that Declaration postulates:

"Property being a sacred and inviolable right, no one can be deprived of it unless a legally established public necessity demands it, and on condition of just and prior indemnity."

The U.S.S.R.

Art. 6 of the Soviet Constitution says:

The land, its mineral wealth, waters, forests, mills, factories, mines, rail, water and air transport, banks, communications large State-organized agricultural enterprises (State farms, machine and tractor stations and the like) as well as Municipal enterprises and the bulk of the dwelling houses in the cities and industrial localities, are State property, that is, belong to the whole people.

Art. 10 postulates that the personal property rights of citizens in their incomes and savings from work, in their dwelling houses and subsidiary home enterprises, in articles of domestic economy and use and articles of personal use and convenience as well as the right of citizens to inherit personal property is protected by the law.

Rumania.

Sec. 9 of the 1948 Constitution says :

The land belongs to those who till it. The State protects property based on the peasant's work. It encourages and assists village co-operation.

Korea.

Art. 15 of the 1948 Constitution states:

Expropriation of private property shall be accompanied by payment of due compensation.

Nicaragua.

Art. 58 of the 1948 Constitution postulates:

"None may be deprived of his property save by judgment of a court or after fair compensation to be determined by judicial authority or for reason of public utility or social interest in accordance with the law. In case of national war, internal disturbance or public calamity, the competent authorities may make use of private property in so far as the public good so requires but the right to subsequent compensation shall be reserved."

Czechoslovakia.

Section 8 of the 1948 Constitutions says:

"Subject to the general provisions of law, every citizen may acquire fixed and other property in any place in the Czechoslovak Republic and carry on a gainful occupation there."

Section 9 (1): Private ownership may only be restricted by law.

(3) No person shall misuse the right of property to the detriment of the community.

Germany.

Sec. 14 of the Constitution of the Federal Republic says :

(1) Property and the right of inheritance are guaranteed. The scope and limits shall be determined by laws.

(2) Property involves responsibilities. It must be used so as to serve the general good at the same time.

Hungary.

Sec. 8 of the 1949 Constitution of the People's Republic says:

(1) The Constitution recognizes and protects all property acquired by work.

(2) Private property and private enterprise must not be harmful to the public interest.

(3) The Constitution guarantees the right of inheritance.

Costa Rica.

Sec. 45 of the 1949 Constitution states:

Property shall be inviolable. . . .

The legislative assembly may, for reasons of public necessity, by a vote of two-thirds of its members, impose limitations on property in the social interest.

Government of India Act, 1935.

The provision corresponding to Art. 31 in the Government of India Act, 1935, is Sec. 299, which states:

“(1) No person shall be deprived of his property in British India save by authority of law.

“(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorizing the compulsory acquisition for public purposes of any land or any commercial industrial undertaking, or any interest in or in any company owning any commercial or industrial undertaking, unless the law provides for the payment of compensation or specifies the principles on which and the manner in which it is to be determined.”

COMMENTARIES ON FOREIGN CONSTITUTIONS.

The U. S. A. (America).

The Fifth and Fourteenth Amendments protect the private property of a citizen from any deprivation thereof by action of the Congress or the State legislature respectively except by “due process of law.”³ Thus the State can interfere with the proprietary rights of a citizen only in the exercise of its powers of taxation, *eminent domain*, penalty and the law of escheat. Any arbitrary deprivation or acquisition otherwise than by due process of law is taboo. In the interests of public welfare the state can exercise its taxing and police powers to control the use of private property (*vide* Notes under Art. 19). The present clauses (5th and 14th Amendments) refer to deprivation of property.

“Deprivation” means both total and partial so as to reduce its value or utility to the person deprived.³ Partial deprivation may arise by flooding the land on account of a dam placed across a water course³ or by preventing access to one’s property by occupation of the front street⁴ or by a second grant after the original grant of exclusive privilege.⁵ Any change in any rule of law which does not disturb “property rights” is not deprivation of property as no individual has any vested right of property in any rule of law.⁶

Austin defines ownership as “a right over a determinate thing indefinite in point of time, unrestricted in point of disposition and unlimited in point of duration.” Thus the components of ownership are possession, enjoyment and disposition. The sovereign power of the state permits appropriation of the citizen’s property on the ground of public utility based on the maxim “*Salus populi est suprema lex*” and “*necessita publica major est quam privata*”. These maxims mean “The welfare of the people or the public, is the paramount law” and “Public necessity is greater than private.”

‘*Eminent Domain*’.—The power to take property for public use is spoken of by Kent as inherent sovereign power. Incident to this power of the State is the requirement that property shall not be taken for public use without just

3. *Pumpelly v. Green Bay Co.*, (1871) 13 Wall 166.

4. *Lackland v. R. R. Co.*, 31 Mo. 180.

5. *Central Bridge v. Lowell*, 4 Grey 474.

6. *Munn v. Illinois*, (1876) 94 U. S. 113.

compensation. This power of compulsory acquisition is termed *Eminent Domain*. Hugo Grotius who appears to have originated this term in 1625 wrote of this power in his work *De jure Belli et pacis* thuswise:

"The property of the subjects is under the *Eminent Domain* of the state, so that the state or who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for the ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property." Theyer,⁷ as quoted by Nichols, puts pithily the relationship of the state and the individual in the matter of *Eminent Domain* thuswise:

"But while the obligation (to make compensation) is thus well established and clear, let it be particularly noticed upon what ground it stands, viz. upon the natural rights of the individual. On the other hand, the right of the state to take springs from a different source, viz., a necessity of Government. These two, therefore, have not the same origin; they do not come, for instance, from any implied contract between the state and the individual, that the former shall have the property, if it will make compensation; the right is no mere right of pre-emption and it has no condition of compensation annexed to it, either precedent or subsequent; but there is a right to take and attached to it as an incident, an obligation to make compensation; this latter morally speaking follows the other, indeed like a shadow but it is yet distinct from it and flows from another source."

In *Knox v. Lee*⁸ it was held that the Fifth Amendment had always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses. The Government takes over during war, railroads, steel,⁹ steel mills, shipyards, telephones, telegraph lines, the capacity output of factories and other producing activities. It cannot be contended that the Government thereby becomes liable to pay for an appalling number of existing contracts for future services or delivery the performance of which its actions make impossible."

The police power of the State to acquire or to tax has to be according to well-known standards of "Due process of law." In respect of the taxing powers rules 'due process' obliges the state to observe the following rules:

- (1) that the tax shall be for a public purpose,
- (2) that it shall uniformly operate upon those subject to it,
- (3) that either the person or the property shall be within the jurisdiction of the Government levying the tax,
- (4) that in the assessment and collection of the tax certain guarantees against injustice to individuals especially in the case of specific as distinguished from *ad valorem* taxes, by way of notice and opportunity for hearing shall be provided.¹⁰

7. Theyer's 'Cases on Constitutional Law' (vol. I, p. 953) mentioned in p. 3 of Nichols' 'On Eminent Domain' and referred to by Mahajan, J., in *State of Bihar v. Sri Kameshwar Singh*, (1952) S.C.R. 889.

8. 12 Wall 457.

9. *Omnia Commercial Co. Inc. v. U.S.*, 261 U.S. 502.

10. *Vide Willoughby: 'Constitutional Law of U.S.A.' Student Ed.*, p. 800.

It is established that taking of private property for public use is not *per se* a taking without due process any more than is an exercise of taxing power.¹¹ In *Fallbrook Irrigation District v. Bradely*¹² an Act of California was sustained, which provided for the organization of irrigation 'districts' which were given the authority to enter upon lands, to acquire by purchase or condemnation the lands needed for the construction of irrigation works, canals etc. *State of Georgia v. City of Chatanooga*¹³ is authority for the proposition that a State may exercise its sovereign authority of *eminent domain* with reference to lands within its borders which are owned by another State. The power of the Federal centre is such that the consent of the component State for taking of property for its own public use has never been questioned.¹⁴ As in the case of States, the United States can grant the right to exercise the right of *eminent domain* to individuals or corporations.¹⁵ In case of conflict the superior power of the Federal centre over the State is also well established.¹⁶ The property of incorporated companies like any other species of property are subject to the State's power of *eminent domain*.¹⁷ "A contract is property and, like any other property, may be taken under condemnation proceedings for public use."¹⁷

In *Eastern Railroad Co. v. Boston*,¹⁸ it has been held that it is exclusively for the legislature to determine whether the acquisition is warranted by public benefit or necessity and that it is not a judicial question. But the legislature can delegate this power to designated officers or tribunals. But the question of "public nature" should be rationally dealt with and not arbitrarily. Thus a house-owner near a thoroughfare cannot be asked to vacate simply because the authority of the city feels some other use for the land would be more profitable and beneficial to the citizens as a whole.¹⁹

In all cases it is for the court to say in each case whether the action of the legislature has been a "due process".²⁰ But legislation which curtails or limits private ownership must be strictly construed and tested if the entire formalities of law and procedure had been complied with so as to "make the right of the Government perfected and the right of the citizen appropriated"²¹.

The police power of a state must be exercised on the basis of public as distinguished from private use or interest. Under *eminent domain*, compensation will lie. Under the police power, private property cannot be taken by Government except in very special cases. But its use can be regulated and if through the restraint in its use, the value of the property depreciates or gets destroyed, no compensation could be recoverable from the State by the owner. Thus in *Mugler v. Kansas*²² it was definitely held that no constitutional objection could be made to a police measure, otherwise valid, which without compensation provided for, in its operation, deprived of value private property existing at the time the law was passed.

If a contract is rendered impossible by lawful Government action, it is ended and not appropriated. In Justice Butler's words,²³ "The requirement

11. *Ibid.*, pages 795 to 797.

12. *Ibid.*, 164 U.S. 112.

13. 264 U.S. 472. 473.

14. *Kohl v. United States*, (91 U.S. 367).

15. *Cherokee Nation v. Kansa Ry. Co.*, 135 U.S. 641.

16. *Ibid.*

17. *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685.

18. 15 Amer. Rep. 13.

19. Opinion of Justices 204 Mass. 607.

20. *Bailey v. Anderson*, (1945) 326 U.S. 203.

21. Cooley: 'Constitutional Law', p. 409.

22. *Mugler v. Kansas*, 123 U.S. 623.

23. *Sea Board Air Line Co. v. U.S.* (1923) 261 U.S. 299.

that just compensation shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is part of such compensation. When the United States condemns and takes possession of land before ascertainment of paying compensation, the owner is not limited in his claim to the value of the property at the time of taking; he is entitled to such addition as will produce the equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added."

Acquisition of property by State during wartime and destruction of same before enemy occupation to make it unserviceable to enemy was held recently to be compensable. The safety of the state overrode all consideration of private loss and the Fifth Amendment cannot be invoked for any compensation.²⁴

England.

In England the use and enjoyment of property are protected by civil and criminal law. In times of national crisis and danger, the Crown may seize the property of the subject for the defence of the realm,²⁵ but subject to the customary compensation to be paid by the state to the subject. Lord Parmoor stated in *De Keyser's case*,²⁵ "When the power of the executive to interfere with the property or liberty of the subject has been placed under parliamentary control and directly regulated by statute the executive no longer derives its authority from the Royal prerogative of the Crown but from Parliament and in exercising such authority the executive is bound to observe the restrictions which Parliament has imposed on the subject."

The power of the Crown is thus virtually exercised by the British Parliament. The Defence of the Realm Consolidation Act, 1916, extends the power to compulsorily acquire property for purposes connected with the defence of the Realm on payment of compensation. In an earlier case of *X's petition of Rights*,²⁶ it was held that the Crown could acquire property compulsorily for war purposes without payment of compensation to the private owner of the property. The conflict between the two cases^{25 26} can in a way be resolved by limiting the principle of the earlier case²⁶ to acquisition for a pure war purpose as distinguished from a purely administrative purpose which was the point in *De Keyser's case*.²⁵ Parliament has an unrestricted right to impose taxes on property or otherwise²⁷ just as it has the right to acquire property for public use subject to compensation. Mr. Broom²⁸ says, "Next in degree to the right of personal liberty is that of enjoying private property without undue interference or molestation, and the requirement that property shall not be taken for public use without just compensation is but an affirmation of the great doctrine established by the Common Law for the protection of private property. It is founded in Natural equity and laid down as a principle of universal law."

There can be no invasion of private property in England except by consent of the owner or by act of Parliament. Lord Camden observed in *Entick v. Carrington*,²⁹ "By the laws of England, every invasion of private property, be

24. *United States v. Caltex*, 1955 N.U.C. 1961: 344 U.S. 149: 97 Law E.D. 157.

25. *Attorney General v. De Keyser's Hotel*, (1920) A.C. 508.

26. (1915) 3 K.B. 649; compromised

on appeal (1916) 32 T.L.R. 699.

27. *Attorney General v. Wilt's United Dairies*, (1921), 91 L.T.K.B. 897.

28. See his 'Constitutional Law'.

29. (1765) 19 St. Tr. 1067.

it ever so minute, is a trespass. No man can set his foot upon my ground without any licence. If he admits the fact, he is bound to show by way of justification that some positive law has empowered or excused him."

There can similarly be no "deprivation of property" in England except by consent of owner as 'by act of Parliament' in effect means "the consent of the nation." It can tax for raising revenue. It can also acquire for public purposes such as industry, development schemes and for defence in times of war. Such acquisition must be expressed by Parliament in express words and not by mere implication.³⁰ If further follows such acquisition should be compensated for the loss sustained. "Loss" means not merely the value of the property but any incidental losses resulting from such acquisition, as recurring profit in a business etc. Unless Parliament in unequivocal terms debars any such compensation payment, the loss has to be paid for.³¹ Any legislation which prohibits compensation though valid (as Parliament is the supreme law-giver), it nevertheless must be strictly construed and all conditions laid therein must be scrupulously fulfilled by the executive, as it deprives the citizen of a valuable right to be compensated for the loss sustained.³²

While Parliament has even the power to take away all rights to property, no parliamentary statute which is vague or indefinite in the matter of taking away of any vested proprietary rights can be recognized by courts of law. In *Young v. Adams*³³ the Privy Council opined, "A retrospective operation ought not to be given to the statute unless the intention of the legislature is expressed in plain and unambiguous language, because, it manifestly shocks our sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment." The presumption attracts to a greater extent when the vested rights of a 'limited' class of persons is affected by retrospective law, particularly when no provision for compensation is made.

Australia.

The Australian Commonwealth law provides for the acquisition of property on "just terms". Sec. 51 (xxxix) which deals with this aspect posits "the acquisition of property on just terms from any state or person for any purpose in respect of which Parliament has power to make laws." Just terms involve full and adequate compensation for compulsory taking.³⁴ The American Constitution is more emphatic in that it enjoins that "no private property shall be taken for public use without just compensation." That is an absolute prohibition. The Australian counterpart does not appear to indicate so much. It is only a positive grant of legislative power and does not seem to involve a corresponding limitation with respect to the executive power of the Commonwealth.³⁴ In the instant case³⁴ the only power relied upon by the defendant Commonwealth was the power to make laws in respect to defence under Regulation 3. Regulation 5 speaks of a price or remuneration agreed or determined not exceeding the National Security (Prices) Regulations. The latter regulation provides arbitration in the event of a dispute

30. *Inglewood Pulp Co. v. New Brunswick Commission*, A.I.R. 1928 P.C. 287.

31. *Central Control Board v. Cannon Brewery*, (1919) A.C. 774.
Commissioner v. Logan, (1903) (1903) A.C. 335.

32. *Minister of Health v. Rex*, (1930) 2 K.B. 98.

33. (1898) A.C. 469.

34. *Johnston Fear & Kingham and another v. Commonwealth*, (1943) 6 C.L.R. 314 (H.C.).

for a fair and reasonable price. These regulations were attacked as *ultra vires* as they spoke only of a "price" not for compensation for loss caused by taking of the goods; that the upper limit is fixed with reference to the Prices Regulations and that there is no provision for a tribunal to judge, and that the "arbitrator" cannot take the place of a judge. The regulations were struck down as unconstitutional as price is not "just terms." The question whether compensation assessment must be vested in a court remained unsettled. In *Australian Apple etc. Marketing Board v. Tonking*,³⁵ Rich and Williams, JJ., doubted whether a conclusive power of assessment could be entrusted to an administrative body at all on the ground that this function was part of the judicial power of the Commonwealth and must be vested accordingly. They conceded the possibility that mere computation might validly be delegated to an administrative body and said the whole basis of assessment must then be clearly defined so as to provide what the court considers "just terms". Latham, C.J., and Rich and Williams, JJ., agreed that in any event laws providing for administrative assessment of compensation must provide for a fair hearing and must require the assessors to award "a full and perfect equivalent for the property taken".

In *Grace Bros. Property Ltd. v. Commonwealth*³⁶ it has been held that Parliament has power to regulate the terms of compensation and no court should hold such legislation invalid unless it is such that a reasonable man could not regard its terms as being "just".

In *Minister of State for the Army v. Dalziel*³⁷ a certain land owned by a Bank was let on a tenancy to Dalziel for the business of parking motor cars. The Minister for Army, purporting to act under Reg. 54 of the National Security (General) Regulations, took possession of this land for defence purposes. Dalziel refused the offer of compensation as it was meagre and did not take into account loss of occupation or profit. Their Lordships held, "The *Eminent Domain* doctrine of the U.S.A. postulates the right to take to itself any property within its territory or any interest therein on such terms and for such purposes as it thinks proper, *Eminent Domain* being thus the proprietary aspect of sovereignty. The Commonwealth of Australia is not, however, a fully sovereign power. . . . Its Constitution contains a provision of a fundamental character designed to protect citizens from being deprived of their property by the sovereign state except upon just terms. . . . It extends to acquisition of any interest in any property (in the instant case the possessory tenancy right of Dalziel only) Property in relation to land is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the longest possible bundle. . . . It would be wholly inconsistent with the language of the placitum to hold that whilst preventing the legislature from authorizing the acquisition of a citizen's full title except upon just terms, it leaves it open to the legislature to seize possession and enjoy the full fruits of possession, indefinitely on any term it chooses or upon no terms at all merely because a twist is made in the connotation of the word 'acquisition'. Acquisition is not merely acquisition of the full right and title but anything short of it, viz., tenancy right, usufructuary mortgage right etc." The Regulation in question was consequently struck out as *ultra vires* of Sec. 51 (xxxi) of the Australian Constitution.

It may be noted that in the Australian Constitution the legislative power of the Commonwealth Parliament has listed (*vide* Clause xxxi of Sec. 51)

35. (1942) 66 C.L.R. 77.

37. (1944) 68 C.L.R. 261.

36. (1946) 72 C.L.R. 269.

the acquisition of property on "just terms" as a head. In India the entry is 36 of List 2 Sch. VII which merely provides for legislative power to make laws for the acquisition and requisitioning of property. The criterion of "public purpose" and "payment of compensation" are the subject of specific enactment in the body of the Constitution in Art. 31 (2)³⁸.

India.

Article 31 is the charter guaranteeing right to private property subject to the provisions in the article. Clause (1) assures protection and denies deprivation of property except by authority of law. Clause (2) assures that the taking possession of or acquisition of private property can only be for public purposes and that after giving due compensation to the party affected. Clause (3) relates to validity of state laws after the commencement of the Constitution while clause (4) refers to pending bills at the commencement of the Constitution; clause (5) provides the exceptions to clause (2) while clause (6) refers to the validity of certain pre-Constitution laws. Art. 31A saves the acquisition of Estates from the operation of Art. 31. The term "estate" connotes the same as in land tenures including jagir, inam, muafi etc. Art. 31B validates certain Acts and Regulations.

Art. 31 Clause (1).

No Deprivation except under authority of law.

This clause assures that there shall be no deprivation by executive authority of private property except under law. This is a fundamental right vouchsafed in a negative form. The protection extends to a citizen as well as an alien to all property situate in India.

The clause, however, means that a person can be deprived of his property under authority of law.³⁹ The protection is against the executive. Legislative expropriation of property is not touched though such an expropriatory law must otherwise be valid in law and within the competence of the legislature.⁴⁰ Such a law to be valid must sanction the taking or acquisition of the property only for public purposes. In such a case of acquisition there is a right to compensation provided in Art. 31 (2), the absence of which also will invalidate the law subject of course to the provisions in clauses (4) to (6) of Art. 31 and Art. 31A-31B.

Comparison of clauses (1) and (2).

Clause (1) and Clause (2) are not the same. The former is the genus of which a species is referred to in clause (2). In clause (2) the "deprivation" is restricted to "taking possession" or "acquiring" for public interest. But in clause (1) there is no such restriction and deprivation therein relates to "any mode of deprivation." Clause (1) permits of no deprivation of whatever kind except by authority of law.⁴¹ Destruction of property in order to prevent a fire from spreading will come under clause (1) and not clause (2). Clause (1) may be termed in American parlance the "police power of the

38. *State of Bihar v. Kameshwar Singh*, A.I.R. 1952 S.C. 252: 1952 S.C.R. 889.

39. *Shanta Devi v. Custodian of E.P.*, A.I.R. 1952 M.B. 181.

40. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (625).

41. *Nabhir Rajiah v. State of Madras*, (1952) S.C.R. 744.

state" while clause (2) refers to the power of the *Eminent Domain*. Compensation is allowed only for the latter category and not for the former. Thus if under "the police power" there is a regulation for letting accommodation under the Defence of India Rules to enable efficient prosecution of the war or the maintenance of essential supplies and services no compensation is leviable. While clause (2) is a restriction upon the powers of the legislature clause (1) is not.⁴² The latter is a limitation on the executive while the former is a restraint on the legislature.⁴³ Clause (1) cannot be challenged except on the ground of legislative competence. There is not even the power of judicial review on the ground of reasonableness or otherwise of the law similar to cases arising under Art. 21.⁴⁴ But a law arising under clause (2) to be valid must first fulfil the terms of clause (2) unless it is saved by clauses (4) and (6) or Arts. 31A and 31B.

As in the American and English law such law which restricts private property rights should be strictly scrutinized. The term "under authority of law" in clause (1) implies a strict compliance with the terms and conditions laid down by the statute, before any act performed under the law could be validly recognized. Thus if a law permits the executive to occupy vacant premises "after due enquiry", an order under the law will be invalid if no opportunity is extended to the landlord to be heard.⁴⁴

It must be noted that Art. 19 (1) (f) is not applicable when a person is deprived of his property by a law under Art. 31 (1).⁴⁵ Thus Sec. 40 of the Administration of Evacuee Property Act, 1950,⁴⁶ and Secs. 167 (8) and 182 of the Sea Customs Act, 1878,⁴⁷ are all provisions under the "police power of the state".

Terms.

(a) The word "*property*" indicates only that which can be acquired, disposed of or taken possession of.⁴⁸ "Incorporeal right" may also be "*property*" within the meaning of this article if only it can be acquired, held, or disposed of by itself.⁴⁹ It comprehends even "any interest" short of full ownership such as that of a mortgagee or lessee.⁵⁰ In *Jupiter General Ins. v. Rajagopalan*⁵¹ "property" in Art. 31 (2) was held to mean proprietary rights *in rem* and not rights *in personam* such as the benefit of a contract. The right to use a public highway for purposes of trade is not an easement and as such is not property in law.⁵²

(b) "*Deprived*" is not the same thing as "acquisition" or "taking possession" as used in clause (2). It has a wider significance.⁴⁹ It would mean "destruction" or "confiscation" of property.⁴⁸ It excludes taking by consent or by agreement with the true owner.⁵³ It is not the same thing as restriction of ownership which falls short of dispossession.⁴⁸

(c) "*Person*" means and includes natural as well as artificial persons⁴⁸.

42. *Kameshwar v. Prov. of Bihar*, A.I.R. 1950 Pat. 392.

43. *Gopalan v. State of Madras*, (1950) S.C.J. 174.

44. *Shankart Lal v. Addl. Dy. Commissioner*, A.I.R. 1951 Nag. 22.

45. *Safi v. State of W.B.*, A.I.R. 1951 Cal. 97.

46. *Shanta v. Custodian of E.P.*, A.I.R. 1952 M.B. 181.

47. *Shew Pujan v. Collector*, A.I.R. 1952 Cal. 789.

48. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (233) Das, J.

49. *Dwarkanadas v. Sholapur Spng. Co.*, A.I.R. 1951 Bom. 86.

50. *Baghavant v. Dy. Commissioner*, A.I.R. 1952 C. P. 78.

51. A.I.R. 1952 Punp. 9 (16).

52. *Saghir Ahmed v. State of U.P.*, A.I.R. 1954 S.C. 728.

53. *Nelungaloo v. Commonwealth*, (1948) 75 C.L.R. 495.

(d) "*Save by authority of Law.*"—This should be construed on lines similar to the practice in England and not on the American analogy of "due process." In America it is for the court to say if the "rights" have been curtailed after "due process". In England though the legislature can curtail the rights, the statute should be strictly construed and there must be express words indicative of such "deprivation" of rights, vide *supra* comments under English and American law.

"*Authority of Law.*"—"Law" means statute law enacted by Parliament or the State legislatures. Any subordinate legislative authority does not come into the picture at all. The objects of any law which deprives a person of his property are the need for *Eminent Domain*, or taxation or penalty. Such a law must no doubt be a valid law to court.⁵⁴ In the matter of taxation. Art. 265 specifically states that "no tax shall be levied or collected except by authority of law". It was therefore opined by the Supreme Court in *Ramjilal v. Income Tax Officer*⁵⁵ that Art. 31 must be deemed to deal with deprivation of property otherwise than by taxation. It may be noted that Art. 265 being outside Part III it cannot be deemed to be a fundamental right and so any law of taxation if it leads to deprivation of property cannot be questioned by an application under Art. 31.⁵⁵

In the matter of applying the principle in Art. 31 (1) to expropriation of property for the benefit of a particular individual, it has to be stated that in India, "a public benefit" has to be shown in such cases. This is the view in *Kameshwar v. State of Bihar*.⁵⁶ The relevant legislative Entry 33 of List I also speaks only of acquisition or requisitioning of property for "the purposes of the Union". Entry 36 of List II refers to acquisition or requisition except for the purposes of the Union, subject to Entry 42 of List III. It may be noted that the American law prohibits taking of property except for public use. Cooley puts it thus⁵⁷: "The right of *Eminent Domain* does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer."

In England Parliament as the supreme body is not limited in its powers to pass any law for acquisition for any purpose whatsoever.

No deprivation of property except by authority of law.

Art. 31 (1) embodies the police power of the state while Art. 31 (2) comprises the law of *Eminent Domain*. Art. 31 (1) limits the power of the executive to be in accordance with law, while clause (2) limits the Government in its legislative aspect by the fetters of a public purpose and just compensation. As in America, compensation has to be paid to the citizen only in the latter case. But in the former case of "police power" no such compensation is called for. As already stated, the word "deprived" in Art. 31 (1) signifies absence of consent or agreement with the true owner. It is not restriction of ownership either. It would mean even destruction or confiscation under the police power of the state. The only sanction for such an action on the part of the state is the authority of some valid law. There

54. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869 (625).

55. (1951) 6 D.L.R. (S.C.) 93, followed in *Laxmanappa Nanumantappa Jamkhandi v. Union of India*, A.I.R. 1955 S.C. 3.

56. A.I.R. 1950 Pat. 392.

57. 'Constitutional Limitations', Vol. II, p. 1124.

58. See his 'Constitution of India', 1st Ed., pp. 141-142.

can be no arbitrary deprivation except by authority of law, i.e., statute law. But Art. 31 (2) is not such "deprivation" but is "taking possession of or acquiring for public purposes." The question may be posed if Art. 31 (1) is a protection only against deprivation by the state or does it apply also to action of individuals? Mr. N. R. Raghavachari⁵⁸ would state that "there is nothing in this clause to show that it is intended only against deprivation by the state. . . . It may plausibly be argued that Art. 31 as indicated by its marginal note applies only to such deprivation of properties as land acquisitions etc. by the State and for public purposes as elaborated in the subsequent clauses of Art. 31 and does not apply to deprivation of properties by private individuals or by execution of decrees between them." The learned author would meet this argument by stating that the *prima facie* purpose of Art. 31 (1) is guarantee of right to property against action of the state as well as the individual, that there can be no higher immunity against private action as compared to state action, that marginal heading is never the criterion for the construction of a statute⁵⁹ when the article itself is silent as to whether the immunity is only against state action or state and private action.

It is submitted that this view cannot be supported. The entire Fundamental Rights chapter is in the main a guarantee against excessive state action. The remedy under Art. 32 is only as against the state. If there is a violation of a private right the ordinary law gives the remedy and not the writ procedure (*Vide* Notes under Art. 32). Art. 13 (2) prohibits the state from making any law which takes away or abridges the rights conferred by Part III of the Constitution.

In its positive aspect Art. 31 (1) can be formulated thus: "Any person may be deprived of his property by authority of law." This "law" has to be by statute which binds the state. So state can deprive a citizen only by enforcing the provisions of a valid law passed by a competent Parliament or legislature. It is to emphasise this immunity from state action as a fundamental right that the clause has been worded in negative language.⁶⁰ The protection is only against the executive and not against legislative expropriation of property. Parliament can pass such a law which is limited only by the condition laid in Art. 31 (2). Only then will the law be valid.⁶¹ Deprivation of any kind in the matter of property is not permissible except under authority of law.⁶¹ So Art. 31 (1) is a protection only against state action. In *A. K. Gopalan's* case,⁶² Justice Patanjali Sastri clearly stated, "As for protection against individuals, it is a misconception to think that constitutional safeguards are directed against individuals. They are as a rule directed against the state and its organs. Protection against violation of rights by individuals must be sought in the ordinary law."

Effect of State of West Bengal v. Subod Gopal Bose.⁶³

The latest decision of the Supreme Court of India on ownership of property and the constitutional implications of clauses (1) and (2) of Art. 32 deserve special treatment. It practically throws new light regarding the extent of protection accorded to ownership of private property under our Constitution. Our comments in prior pages on comparison of clauses (1) and (2) of Art.

59. *Balraj Kunwar v. Jagat Pal Singh*, (P.C.) 39 I.A. 132: 26 All. 393 at 406.

See *Shanta Devi v. Custodian of E. P.*, A.I.R. 1952 M.B. 181.

61. *Chiranjit Lal v. Union of India*,

(1950) S.C.R. 869.

62. A.I.R. 1950 S.C. 27: 1950 (2) M.L.J. 42: 63 L.N. 638.

63. *Vide 'The Hindu'* 19th Dec. 1953. Reported in A.I.R. 1954 S.C. 92.

31 which were penned prior to this decision have necessarily to be reviewed in relation to this important judicial pronouncement of the Supreme Court. We yet feel inclined to urge that the wording of clause (1) as police power of the state is distinct and separate and untrammelled by the implications of clause (2) which represents the *Eminent Domain* power with rights to compensation. The latter may be the rational solution even when applied to clause (1) but the Constitution as it stands now does not seem to point to that, as indicated by Mr. Justice S. R. Dass in his dissenting judgment in the West Bengal case under reference.

In the case under reference, the first respondent, Mr. Bose, purchased the entire 24 Parganas collectorate at a sale on January 9, 1942. Under the purchase the respondent acquired by virtue of Sec. 37 of the Bengal Revenue Sales Act, 1859, the right to "avoid and annul all under-tenures and forthwith to eject all under-tenants with certain exceptions. In exercise of his rights Mr. Bose gave notices of ejection and brought a suit in 1946 to evict certain under-tenants, including the second respondent in the present appeal. The second respondent went on appeal to the District Judge contending that the under-tenure came within one of the exceptions referred to in Sec. 37 of the Act. When the appeal was pending the West Bengal Revenue Sales (West Bengal Amendment) Bill was introduced in the Assembly 'to avert large-scale evictions'. The bill was passed into an Amending Act on March 15, 1950. By Sec. 7 of the Act, which is the bone of contention now, it was provided that "all pending suits, appeals and other proceedings which had not resulted in delivery of possession shall abate".

Thereupon Mr. Bose went on appeal to the High Court raising the constitutional issue that Sec. 7 was void as abridging his fundamental rights under Art. 19 (1) (f) and Art. 31. The High Court held that the respondent's right to annul under-tenures and evict under-tenants became a vested right acquired by him under his purchase before Sec. 37 was amended. The retrospective deprivation of that right by Sec. 7 of the Amending Act without abatement of the price paid by the respondent at the revenue sale was an infringement of his fundamental right under Art. 19 (1) (f) to hold property, with all the rights required under his purchase; and as such deprivation was not a reasonable restriction on the respondent's exercise of his vested right, Sec. 7 was *ultra vires* of the Constitution.

On appeal to the Supreme Court three separate judgments were written with one final conclusion to allow the West Bengal appeal, namely upholding the constitutionality of the impugned Sec. 7. The importance of the three separate judgments lies on the attitudes expressed on the large questions involved, namely, if the case fell within the scope of Art. 19 (1) (f) and (5) or under Art. 31. The Chief Justice upheld the latter (Art. 31) and with him concurred their Lordships Mr. Justice Mahajan and Mr. Justice Ghulam Hassan. Their Lordships Mr. Justice S. R. Dass and Mr. Justice Jagannath Das held that Art. 19 (1) applied.

Mr. Justice S. R. Dass held that clauses (1) and (2) of Art. 31 were mutually exclusive in scope and content—clause (2) imposing limitations only on two particular kinds of deprivation of private property, namely, those brought about by acquisition or taking possession thereof and clause (1) authorizing all kinds of deprivation with limitation except that they should be authorized by law. Justice Dass said, "The result of reading Art. 31 clauses (1) and (2), together will be to hold that our Constitution has not provided for us any protection against the exercise of the State's police power either by the

legislature or by the executive. . . . The limitations found in clause (2) constituted our fundamental right against the state's power of *Eminent Domain*.

Thus viewed the rights of the respondent have not been taken possession of or acquired at all in the exercise of the power of *Eminent Domain* but have been extinguished or destroyed in the exercise of state's police power to prevent public mischief and anti-social activities referred to in the objects and reasons appended to the Bill which eventually became the impugned law. In this process the respondent Mr. Bose has been deprived of his property, if these rights can be properly so described, by authority of law and the case falls within Art. 31 (1) and not within Art. 31 (2) at all. . . . If the impugned section is regarded as imposing a restriction on the right of Mr. Bose to hold property, then I hold such restrictions, in the circumstances of this case, to be quite reasonable and permissible under Art. 19 (5). If the impugned section operates as an extinguishment of his right to property, treating the right to annul under-tenures and to eject under-tenants as property, then these rights of the respondent have not been taken possession of or acquired by the state within the meaning of Art. 31 (2) but he has been deprived of his property by authority of law under Art. 31 (1) which calls for no compensation."

The learned Chief Justice, however, opined, "Under the Constitution all the broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the State under clause (1) of Art. 19, the powers of the state regulation of those freedoms in public interest being defined in relation to each of those freedoms by clauses (2) to (6) of that Article and that the rights of private property are separately dealt with and their protection provided for in Art. 31. In this view, the question whether Sec. 7 of the Amending Act is a reasonable restriction on the exercise of the respondent's right to the property purchased by him cannot arise as clause (5) of Art. (19) can then have reference only to disabilities of the kind already mentioned. . . ." The most serious objection the Chief Justice took to Mr. Justice Dass's view (quoted above) was that "it largely nullifies the protection afforded by the Constitution to right of private property as a fundamental right. For in this view the state acting through its legislative organ, could, for instance, arbitrarily prohibit a person from using his property or authorize its destruction, or render it useless for him without a public purpose to be served thereby as these two conditions are stipulated only for acquisition and taking possession under clause (2). . . . It would be a startling irony if the fundamental rights of property were in effect to be turned by construction into an arbitrary power of the state to deprive a person of his property without compensation in all ways, other than acquisition or taking possession of such property."

The learned Chief Justice, it seems to us, has taken a course of construction most beneficial to the citizen. But it looks as if clause (1) of Art. 31 is mere 'police power' without the safeguard of compensation which, however, is vouchsafed only to the *Eminent Domain* sphere under clause (2). Otherwise there is the anomaly that the state is liable in compensation to all acts even if it is occasioned by mere police power in defence of the state or in defence of the citizen himself, e.g., destruction of houses during war on a scorched earth policy, destroying house on fire just to stop the conflagration spreading further, regulation of letting accommodation during emergencies to enable efficient prosecution of the war etc. But what is important is that the state should not abuse this "police power" under clause (1). As clause (1) authorizes any deprivation of property under authority of law, the learned Chief Justice would postulate that the limiting power thereof is covered by

clause (2). This opinion is the present law as laid down by the Supreme Court.

The Chief Justice further opined, "The American doctrine of police power as a distinct and specific legislative power is not recognised in our Constitution and it is therefore contrary to the scheme of the Constitution to say that Cl. (1) of Art. 31 must be read in positive terms and understood as conferring police power on the legislature in relation to rights to property. It is the legislature alone that can interpose and compel the individual to part with his property." While clause (1) gives one limitation that it should be under a law, the further limitations are set out in clause (2) that there should be a public purpose and compensation. His Lordship further states, "So clauses (1) and (2) should be read together and understood as dealing with the same subject, namely, the limitations on the state's power, the deprivation contemplated in clause (1) being no other than the acquisition or taking possession of property referred to in clause (2). . . . No cut and dried test can be formulated as to whether in a given case the owner is 'deprived' of his property within the meaning of Article 31. Broadly speaking, it may be said that an abridgement would be so substantial as to amount to deprivation within the meaning of Art. 31 (2) if in effect it withheld the property from the possession and enjoyment of the owner or seriously impaired its use and enjoyment by him, or materially reduced its value. . . . The learned judges of the High Court did not consider the case from this point of view. They applied Art. 19 (1) (f) and (5) and held that Sec. 7 of the Amending Act, by its retrospective operation, imposed on the respondent's enjoyment of the property purchased by him at the revenue sale restrictions which were not reasonable. . . ."

The Chief Justice finally upheld the validity of the West Bengal legislation and said, "This amendment is in line with the traditional tendency of legislation in this country affording relief to tenants whenever the tenancy laws were found, due to changing conditions, to operate harshly on the tenantry. I find it difficult to hold that the abridgement, sought to be affected retrospectively of the rights of a purchaser, is so substantial as to amount to deprivation of his property within the meaning of Article 31 (2)."

It is permissible for us to point out that the learned Chief Justice is far too emphatic that "the deprivation contemplated in clause (1) is no other than the acquisition or taking possession of property in clause (2). One can reconcile to the position that when "deprivation" amounts to "acquisition" or "taking possession" then clause (2) gets attracted. But to say that all deprivations under clause (1) are controlled by the "compensation clause" of clause (2) is stretching too much the rationale of the matter and to deny the police power of the state to act in emergencies in public interest. In such cases the only limitation on such "police power" is that it must be done under a valid law.

Jagannath Das, J., appears to have focussed attention in his judgment in this regard when he stated, "While the framers of the Constitution laid down the requirement of the authority of law for 'deprivation of property' with a larger connotation, they limited the requirement of payment of compensation to what may reasonably be comprehended within the concepts of 'acquisition' and 'taking possession'. To read these words and phrases in Art. 31 (2) as meaning the same as 'deprivation' used in Art. 31 (1) and to make the test of 'substantial abridgement' or 'deprivation' as the *sine qua non* for payment

of compensation under Art. 31 (2) is to open the door for introduction of most if not all the elements of wide uncertainty which have gathered round the word 'taken' used in the corresponding context in the American Constitution." But the majority opinion as reflected by the Chief Justice in the instant case was to the effect "that the abridgement sought to be effected retrospectively of the rights of a purchaser at a revenue sale is not so substantial as to amount to a deprivation of his property within the meaning of Art. 31 (1) and (2). No question accordingly arises as to the applicability of clause 5 (b) (ii) of Art. 31 to the case," which indicates how social control and regulation could extend to the deprivation of such rights without the obligation of compensation being paid under Art. 31 (2).

It is pertinent also to refer to Jagannath Das, J.'s views on the instant case as to the import of Art. 19. His Lordship posited, "My Lord the Chief Justice is inclined to the view that the fundamental right in Art. 19 (1) (f) has no reference to concrete property rights but refers only to the natural rights and freedoms inherent in the status of a citizen. Even so, with respect, I fail to see how the restrictions on the exercise of those rights referred to in Article 19 (5) can be otherwise than with reference to concrete property rights. To me it appears that Art. 19 (1) (f) while probably meant to relate to the natural rights of the citizen comprehends within its scope also concrete property rights. To construe Art. 19 (1) (f) and (5) as not having reference to concrete property rights and restrictions on them would enable the legislature to impose unreasonable restrictions on the enjoyment of concrete property except where such restrictions can be brought within the scope of Art. 31 (2) by some process of construction. . . . As regards Art. 31, I agree that clause (1) cannot be construed as being either a declaration or implied recognition of the American Doctrine of 'police power'. . . . No such grant of police power is necessary having regard to the scheme of the Constitution *vide* Entries in Lists of 7th Schedule by virtue of Arts. 245 to 255."

We quoted at length the minority judgment also as the matter enunciated is not free from doubt.

The later amendment of Article 31.

There has been recent attempts to amend the Constitution with reference to "property rights". It need hardly be said that a constitution is sacrosanct and the Fundamental Rights vouchsafed therein cannot be interfered with according to the whims of any party in power. It then ceases to be a constitution and merely takes the place of an ordinary statute. We may here restate the position in the words of Mr. Patanjali Sastri, Ex Chief Justice of the Supreme Court of India,⁶⁴ who took the solemn occasion of the Delhi University convocation to include in his address the following: "Our Constitution has hardly been in operation for five years when it has already been amended several times and more amendments are said to be in the offing. For instance, if Press reports are true, it is now proposed to amend the provision of payment of compensation on compulsory acquisition of private property by making compensation discretionary and non-justiciable, that is, not open to question in a court of law. It is hardly necessary to labour the point that the proposed amendment, if enacted, would strike at the root of the constitutional protection of private property which is one of the most

64. Convocation Address of the
Delhi University delivered on

11-12-54 *vide* Hindu 12-12-54.

important Fundamental Rights guaranteed to the people. In the present political conditions in the country, experience has shown that the safeguard provided against frequent amendment of the Constitution has proved inadequate and perhaps a convention could be established whereby constitutional amendments of great importance to the community should be specifically placed before the people and their verdict obtained, at the next general elections before the amending Bill is introduced in Parliament. No great harm could result from such procedure as the delay involved would not be much. On the other hand, it may tend to obviate a feeling of grievance among those sections of the community who do not favour the change that the passage of the amendment was secured by an unwarranted use of party majority without the issue having been squarely placed before the people."

We have no hesitation in agreeing with the views of Mr. Patanjali Sastri. His words are pearls of wisdom born out of deep and mature thought for the good of the nation. To make compensation non-justiciable is to push up executive supremacy over judicial justice and to make the decision arbitrary often tending to injustice. Such power should not be given to the executive. One cannot give a fundamental right over property in Art. 31 (2) and take it away through a process of constitutional amendment. This is negation of true Democracy. It smacks of arbitrariness born out of power politics.

The new Amendment (moved in 1954 December).

While we have outlined Shri Patanjali Sastri's opinion and have expressed our agreement with his authoritative views in the main, we feel it is appropriate to record hereunder the Constitution amendment moved by the Prime Minister of India in Lok Sabha (Union Parliament) on 20th December, 1954. The suggested amendments are to Articles 31, 31A and 305 of the Constitution and to the Ninth Schedule.

The statement of Objects and Reasons of the Bill says:

"Recent decisions of the Supreme Court have given a very wide meaning to clauses (1) and (2) of Article 31. Despite the differences in the wording of the two clauses, they are regarded as dealing with the same subject. The deprivation of property referred to in clause (1) is to be construed in the widest sense as including any curtailment of a right to property. Even where it is caused by a purely regulatory provision in law and is not accompanied by any acquisition or taking possession of that or any other property right by the State, the law in order to be valid according to these decisions, has to provide for compensation under clause (2) of the Article. It is considered, therefore, necessary to restate more precisely the State's power of compulsory acquisition and requisitioning of private property and distinguish it from cases where the operation of regulatory or prohibitory laws of the State results in deprivation of property. This is sought to be done in clause (2) of the Bill.

"It will be recalled that the Zamindari abolition laws which first came in our programme of social welfare legislation was attacked by the interests affected, mainly with reference to Articles 14, 19 and 31 and that in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts, Articles 31A, 31B, and the Ninth Schedule were enacted by the Constitution (First Amendment) Act. Subsequent judicial decisions interpreting Articles 14, 19 and 31 have raised serious difficulties in the way of the Union and the States, putting through other and equally important social welfare legislation on the desired lines, e.g. the following:

"1. While the abolition of Zamindaris and numerous intermediaries between the State and tiller of the soil has been achieved for the most part, our next objectives in land reform are the fixing of limits to the extent of agricultural land that may be owned or occupied by any person, the disposal of any land held in excess of the prescribed maximum and the further modification of the rights of landowners and tenants in agricultural holdings.

"2. The proper planning of urban and rural areas require the beneficial utilization of vacant and waste lands and the clearance of slum areas.

"3. In the interests of national economy the State should have full control over the mineral and oil resources of the country including in particular the power to cancel or modify the terms and conditions of prospecting licences, mining leases, and similar agreements. This is also necessary in relation to public utility undertakings which supply power, light or water to the public under licences granted by the State.

"4. It is often necessary to take over under State management for a temporary period a commercial or industrial undertaking or other property in the public interest or in order to secure the better management of the undertaking or property. Laws providing for such temporary transference to State management should be permissible under the Constitution.

"5. The reforms in company law now under contemplation like the progressive elimination of the managing agency system, provision for the compulsory amalgamation of two or more companies in the national interest, the transfer of an undertaking from one company to another etc., require to be placed above challenge.

"It is accordingly proposed in clause (3) of the Bill to extend the scope of Article 31A so as to cover these categories of essential welfare legislation.

"As a corollary to the proposed amendment of Article 31A, it is proposed in clause (5) of the Bill to include in the Ninth Schedule to the Constitution two more State Acts and four Central Acts which fall within the scope of sub-clauses (d) and (f) of clause (1) of the revised Article 31A. The effect will be their complete retrospective validation under the provisions of Art. 31B.

"A recent judgment of the Supreme Court in *Saghir Ahmed v. The State of U.P.* has raised the question whether an Act providing for a State monopoly in a particular trade or business, conflicts with the freedom of trade and commerce guaranteed by Article 301, but left the question undecided. Clause (6) of Article 19 was amended by the Constitution First Amendment Act in order to take such State monopolies out of the purview of sub-clause (a) of clause (1) of that Article, but no corresponding provision was made in Part XIII of the Constitution with reference to the opening words of Article 301. It appears from the judgment of the Supreme Court that notwithstanding the clear authority of Parliament or of a State Legislature to introduce State monopoly in a particular sphere of trade or commerce, the law might have to be justified before the courts as being in general public interests, under Article 301 or as amounting to 'reasonable restriction' under Article 304 (b). It is considered that any such question ought to be left to the final decision of the Legislature. Clause 4 of the Bill accordingly proposes an amendment of Article 305 to make this clear.

"The net effect of the amendment to Articles 31 and 31A will be to limit payment of compensation only to cases of compulsory acquisition or

requisition by the State for a public purpose. The nine categories mentioned in the new amendment to Art. 31A are primarily exceptions to Article 31 (2). In these latter cases the State concerned could undertake the necessary legislation without being interfered with by Article 14 or Article 19 or Article 31 (1) and (2) of the Constitution. The absence of any reference to the payment of compensation in regard to these cases does not imply that the State undertaking legislation cannot provide for it. But in any case where there is provision for compensation or compensation provided is inadequate, it cannot be a matter for decision by the Courts."

Amendment of Constitution.

Text of Bill.

The following is the text of the Bill to amend the Constitution introduced in the Lok Sabha by Prime Minister Nehru on 20th December, 1954:

"1. *Short Title.*—This Act may be called the Constitution (Fourth Amendment) Act, 1954.

"2. *Amendment of Art. 31.*—In Art. 31 of the Constitution, for Cl. (2), the following clauses shall be substituted, namely:

'(2) No property shall be compulsorily acquired or requisitioned by the state save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

'(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property by the State, notwithstanding that it deprives any person of his property.'

"3. *Amendment of Art. 31 A.*—In Art. 31A of the Constitution :

"A. For clause (1), the following clause shall be, and shall be deemed always to have been, substituted, namely:

'(1) Notwithstanding anything contained in Art. 13, no law providing for,

(a) the acquisition by the State of any estate or of any rights therein, or

'(b) the extinguishment or modification of any rights in estates or in agricultural holdings, or

'(c) the maximum extent of agricultural land that may be owned or occupied by any person and the disposal of any agricultural land held in excess of such maximum, whether by transfer to the State or otherwise, or

'(d) the acquisition or requisitioning of any immovable property for the relief or rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan, or

'(e) the acquisition or requisitioning, for a public purpose of any land, buildings or huts declared in pursuance of law to constitute a slum or of any vacant or waste land, or

'(f) the taking over the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or

'(g) the transfer of any undertaking, wholly or in part, from one company to another or the amalgamation of two or more companies either in the public interest or in order to secure the proper management of the undertaking or of any of the companies, or

'(h) the extinguishment or modification of any rights of managing agents, managing directors, directors, managers or shareholders of companies, or

'(i) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or for the purpose of supplying power, light or water to the public, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14, Art. 19 or Art. 31:

'Provided that where such law is a law made by the legislature of a state, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent'; and

'B. In sub-clause (B) of Clause (2) (i) after the words 'an estate' the words 'or agricultural holding' shall be, and shall be deemed always to have been, inserted; and (ii) after the word 'tenure-holder', the words 'raiyyat, under-riyat' shall be, and shall be deemed always to have been, inserted.

"4. *Amendment of Art. 305.*—For Art. 305 of the Constitution, the following Article shall be substituted, namely:

'305. Saving of existing laws and laws providing for state monopolies —Nothing in Arts. 301 and 303 shall affect the provisions of any existing law and nothing in Art. 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1954, in so far as it relates to, or prevent Parliament or the legislature of a State from making any law relating to any such matter as is referred to in sub-clause (ii) of clause (6) of Art. 19.'

"5. *Amendment of the Ninth Schedule.*—In the Ninth Schedule of the Constitution, after entry 13, the following entries shall be added, namely: '14. The Bihar Displaced Persons' Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act 38 of 1950), 15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U.P. Act of 26 of 1948), 16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act 60 of 1948), 17. Secs. 52-A to 52-G of the Insurance Act, 1938, as inserted by Section 42 of the Insurance (Amendment) Act, 1950 (Act 47 of 1950), 18. The Railway Companies (Emergency Provisions) Act, 1951 (Act 51 of 1951), 19. Chapter III-A of the Industries (Development and Regulation) Act, 1951, as inserted by Sec. 13 of the Industries (Development and Regulation) Amendment Act, 1953 (Act 26 of 1953).'

Important criticisms of the Fourth Amendment.

We have set out in substance the text of the proposed Constitution (Fourth Amendment) Act, 1954. We would place before our readers certain important pronouncements of eminent Indian jurists on such constitutional amendments. The holding of Ninth State Conference of the Madras State Bar Federation in December, 1954 enabled public opinion to be educated on these problems.⁶⁵

1. Shri M. Patanjali Sastri's view.

Mr. M. Patanjali Sastri, Ex Chief Justice of the Supreme Court of India, whose previous pronouncement on the subject we have already quoted, in his presidential speech at the above conference stated, "Speaking recently at another place I deprecated frequent amendments to the Constitution and suggested that amendments of great importance to the community should not be passed without placing the matter before the people and obtaining their verdict. Since then, the Prime Minister of India has introduced in the Lok Sabha certain amendments to Art. 31 (2) and 31A of the Constitution. These amendments are designed to afford constitutional sanction to what is called regulative legislation in respect of which compensation is to be made non-justiciable.

" . . . These amendments are sought to be justified on the ground that judicial decisions have raised serious difficulties in the way of the Union and the States putting through important social welfare legislation on the lines indicated. The Constitution, no doubt, envisages the establishment of a welfare state and has laid down certain directive principles of State policy towards that end. But it is an error to think that social welfare is something incompatible with protection of private property. An eminent English jurist has said, 'The public good is in nothing more essentially interested than in the protection of private property, and the Declaration of Human Rights specifically provides that no one shall be arbitrarily deprived of his property. India, as a signatory to that document, is morally bound to act in conformity with the provision in making her Municipal laws.' A great American Judge observed, 'A strong desire to improve the public condition is not enough to warrant achieving the desire by shorter cut than the constitutional way of paying for the change.' Our Constitution also is based upon that principle. While envisaging measures to prevent concentration of wealth in a few hands and to narrow down the gap between the rich and the poor, which is unfortunately very wide in this country, the Constitution does not favour expropriation of property as a legitimate means of rectifying the existing economic inequalities, but has provided for other means of redressing such inequalities such as levying of taxes and duties of various kinds. These inequalities are not sudden developments which could not have been foreseen when the Constitution was framed and yet the founding fathers deliberately included the protection of private property as a Fundamental Right in Part III and put the Directive Principles of State Policy, regarding social welfare, in Part IV so as not to override the former.

"Nine categories of exceptions to Article 31 (2) are enumerated in the new Article 31A which is to be substituted for the old Article 31A so that the State could undertake in these cases the necessary legislation without being bound to pay compensation. As regards the specific objectives which

65. *Vide* 'The Hindu' and the 'Indian Express' dated 30th and 31st

Dec. 1954, respectively.

the Government have in view as disclosed by these categories the proposed new Article 31A would seem sufficient to answer the purpose. But the Government apparently desire to go further and amend the present Article 31 (2) also by substituting the new Article 31 (2) which includes a new clause (2A). . . ."

Mr. Patanjali Sastri thereafter refers to the statement of objects and reasons and observes tersely, "The reference therein to the recent decisions of the Supreme Court is presumably to *Subodh Gopal Bose's* case reported in 1954 S.C.R. 587 and the *Second Sholapur Mills* case reported in 1954 S.C.R. 674. Now it is not correct to say that the cases referred to decided that the deprivation of property referred to in clause (1) is to be construed as including 'any' curtailment of a right to property. In fact they decided the contrar^y and recognizing that the operation of regulatory and prohibitory laws should not entail liability to pay compensation, left reasonable scope for the exercise of such regulatory powers by the State. This could be seen from the following extracts:—

"The expression "taken possession of or acquired" in clause (2) implies such an appropriation of the properties or abridgement of the incidents of its ownership as would amount to a deprivation of the owner. Any other interference with the enjoyment of private property short of such appropriation or abridgement would not be compensable under Art. 31 (2) (*vide* page 611 of *Subodh Gopal* case)'.

"After observing that the word 'property' has a wider connotation in the context of Article 31, which is designed to protect private property in all its forms and considering the difficulties which such a connotation would lead to in application of Article 31 to any concrete case, the conclusion was stated in these terms: 'The expression taken "possession of or acquired" must be read along with the word "deprived" in clause (1) and understood as having reference to such substantial abridgement of the rights of ownership as would amount to deprivation of the owner of his property. No cut and dry test can be formulated as to whether in a given case, the owner is deprived of his property within the meaning of Article 31. Each case must be decided as it arises on its facts. Broadly speaking, it may be said that an abridgement would be so substantial as to amount to deprivation within the meaning of Article 31, if in effect it withheld the property from the possession and enjoyment of the owner or seriously impaired its use and enjoyment by him or materially reduced its value.'

"To the same effect is the following passage in the judgment of Bose, J., in the *Second Sholapur Mills* case: 'If there is substantial deprivation then clause (2) is, in my judgment, attracted. By substantial deprivation I mean the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to or interest in property. The form is unessential. It is the substance that we must seek'

"As a matter of fact *Subodh Gopal Bose's* case itself involved a curtailment of property right, namely the right to annul certain under-tenures in an estate and nevertheless the legislation which extinguished that right without providing for compensation was upheld as valid, that is to say, the case was regarded as falling within the legitimate exercise of the state's regulatory power. The passages extracted above indicate the scope of regulatory and prohibitory powers which the state can exercise without having to pay compensation. It is only when regulation of private property goes further and

amount to a substantial abridgement of the incidents of ownership that it would amount to deprivation for which compensation could be claimed. Even where there is such substantial abridgement further exceptions are provided for in Article 31 (5) (b) where regulatory power might involve destruction of property and still no compensation would be payable."

Shri Patanjali Sastri thus concludes: "There is thus reasonable scope left under these decisions for the exercise of the state power of regulation and control in relation to private property. The cases represent an earnest attempt to reconcile the rival demands of state control and the regulation of private property and the constitutional protection thereof and lay down a principle which is fair to the Government and just to the citizen and accords with the American view that the general view at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a 'taking' in which case compensation is payable.

"Again it is said, 'Despite the difference in the wording of the two clauses (1) and (2) they are regarded as dealing with the same subject.' The reasons why they were so regarded and the serious anomalies that would arise if they were not so regarded have been elaborately explained in the majority judgment in the first case, one of the reasons being the light thrown on the construction of clause (2) by sub-clause (5) (b) of the same article which is significantly made an exception in clause (2). These exceptions envisage deprivation of property by destruction, confiscation etc., authorized by penal laws and laws made for the promotion of public health, e.g., by slum clearance or the prevention of danger to life or property which but for such specific exception, would be covered by Article 31 (2). That the constitution-makers evidently regarded clauses (1) and (2) as dealing with the same subject 'despite the difference in the wording' is also shown by the public which they inserted at the head of the Article as a whole, namely, 'compulsory acquisition of property'."

Adverting to the proposed changes, Shri Patanjali Sastri observed, "It will be seen that under clause 2-A of the proposed new Article, the constitutional right to compensation is taken away in all cases where the law does not provide for the transfer of the ownership or right to possession of any property to the state. This amendment will have far-reaching consequences. Cases are readily conceivable where it would obviously be unjust to deny the right to compensation to a person who is made to lose the benefit of his ownership or his right to possession without the right being transferred to the state. Take, for instance, the case of an owner whose lands have been submerged by water impounded in execution of a project authorized by law. There would be no transfer of the ownership of the submerged lands or of the right to possession to the state in such a case and the owner will have no constitutional right under the new clause to compensation. The affected owner will have no constitutional remedy. The constitutional protection of private property consists not in any prohibition of appropriation of private property (indeed compulsory acquisition of such property is expressly authorized), but in the insistence on the payment of adequate compensation. If the quantum of compensation is to be left to the discretion of the state and made non-justiciable there will be little left of the guaranteed protection of private property which will then be exposed to all sorts of experimental economic legislation according to the notions of social welfare of the politicians who may come into power from time to time. Such a situation must tend to spread a sense of insecurity in the minds of the people and give rise to conditions of economic instability with

harmful consequences to investment. Another instance perhaps would be the cutting off of the usual supply of water for what are called Mamool wet lands under statutory authority in order to ensure adequate supply of water to an expanding city served by the same tank. . . . Instances can be multiplied. In such cases, according to the construction placed on Article 31, Clauses (1) and (2), it would probably be held that the abridgement of the incidents of ownership is so substantial as to amount to deprivation of rights of property and entitle the owner to compensation. Is it the intention of the Government that the constitutional protection should be withdrawn in such cases? A rider is no doubt added that the absence of any reference to the payment of compensation in the cases covered by the new amendments does not imply that the state cannot provide for it. Of course, it can and probably it will in many of such cases. But the point is that if the state provides for no compensation or for only a nominal compensation the affected owner will have no constitutional remedy. Even the safeguard in the case of a state law, of reservation for the consideration of the President and the receipt of his sanction, is not made applicable to any such law which is covered by the new Article 31 (2-A), but does not fall under the new Article 31A to which alone the proviso regarding such safeguard is to apply."

2. Shri N. C. Chatterji's view.

Shri N. C. Chatterji, M.P., Bar-at-Law, and former Judge of Calcutta High Court, in the course of his inaugural address to the Ninth Conference of the Bar Federation aforesaid echoed Shri Patanjali Sastri's views and said, "If this amendment be enacted it would strike at the root of constitutional protection of private property, which is one of the most important Fundamental Rights guaranteed to the people. . . . No one denies that *Eminent Domain* is the legal capacity of a sovereign state to take private property for public use upon payment of just compensation. . . . The American Supreme Court has repeatedly held that for compensation to be just it must give the fair market value of the property taken. This means not the value to the owner, but the value to a hypothetical purchaser having the same needs as the present owner. . . . The constitutions of America, Ireland, Japan, Burma and other countries provide that acquisition of private property can only be made for public use upon payment of just compensation. . . . Our Supreme Court in the *First Sholapur* case declared, "This right which is described as *Eminent Domain* in American law, is like the power of taxation, an offspring of political necessity and it is supposed to be based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner. . . . But the American and Australian constitutions lay down that just compensation must be paid and that it was justiciable and it was not merely for the legislature or executive to make any provision for the compensation (vide *Monogahala* case 148 U.S. 312). Nichols reiterates this view in his treatise on 'Eminent Domain' and says, 'The phrase "just compensation" means the value of the land taken and the damages if any to the land taken. The adjective "just" only emphasises what would be true if omitted, namely, that the compensation should be the equivalent of the property.' It has been said in this regard that it is difficult to imagine an "unjust compensation". The word "just" is used evidently to intensify the meaning of the word compensation. . . . Radical amendment of Article 31 of the Constitution may lead to arbitrary expropriation of property without payment of just or fair or any compensation. This will destroy the sanctity of private property and may pave the way for a totalitarian regime."

The 'Hindu' Editorial excerpts.

It is pertinent to record the reaction of the Press on the weighty pronouncements of Shri M. Patanjali Sastri and Shri N. C. Chatterji. The 'Hindu'^{65a} opined "The State Lawyers' Conference has done well in setting the ball of discussion on constitutional amendment rolling. . . . In some respects the systematic education of public opinion has suffered a setback since the attainment of Swaraj. The practice has become far too common of springing radical proposals incubated in the private chamber of a political party as a total surprise on both the legislature and the public outside and of rushing the legislation through, before the country has recovered from its surprise mainly by making heavy drafts on its confidence in the ruling party.

It is really putting the cart before the horse to tell the people 'Give me the power to take away your rights and when I have used that power it will be time enough for you to say whether I have used it properly or not.' The paramount interests of social welfare which are pleaded in support of the amendments are not as Mr. Patanjali Sastri has pertinently pointed out, a new factor that has suddenly emerged since the Constitution was framed.

A welfare state which aims at giving every man some definite stake and thus hopes to appeal to his self-interest in maintaining the fabric of a democratic society intact, cannot without convicting itself of inconsistency and forfeiting the public confidence appropriate, or utilize at will, giving or withholding compensation at its pleasure the proprietary rights of any class. To do so would be to make some stakeless in order to give a stake to others in the maintenance of an ordered society."

Adverting to the theory propounded by Shri E. Subramanyam, Minister for Law, (at the Federation Conference) that the executive and legislature were as good if not even better judges of what was proper compensation than even judges, the 'Hindu' put it pithily thus: "As no man can be a judge in his own cause, no Government or for that matter no legislature dominated by a political party should be allowed to sit in judgment on its own policies in so far as they would destroy or attenuate those fundamental rights of the citizen which the Constitution has vowed to safeguard. It is because of this that the courts have been armed with the power of judicial review and the duty of seeing that the citizen is not denied his just rights in the name of public interest. It is, therefore, wholly irrelevant to contend that Ministers and Legislators are as fair-minded men as any judge you can find. They may be fair-minded normally but expediency may constrain them to contrary courses. It is the duty of judges to take a dispassionate view of what is proposed to be done and to test by objective criteria. They may not be wholly immune from unconscious bias but they are trained to look out for and repress such bias. Theirs will be a judicial approach to the problem, whereas that of cabinets and or legislatures will be a political approach. The influence of the courts must not be negated or nullified if the citizen is to have a minimum of assurance that he can live as a free man in a free society."

The above reasoned leading article of the 'Hindu' might indeed serve as a good answer to the valiant defence advanced in favour of the proposed amendment by Mr. T.T. Krishnamachari, Central Minister, when he said on a former occasion. "We have not thought of this Amendment in a vacuum. It is not our intention to clothe the legislatures with powers far beyond the needs of the immediate situation. . . . I do hope that judges of the Supreme

65a. *Vide* Editorial 1st Jan. 1955 of 'The Hindu', Madras.

Court and of the High Courts who are all earnest men bear in mind the caution that they cannot have a dynamic structure with a static law."

The other side of the picture.

At the symposium held at the Federation Conference Mr. V. K. Thiruvengatchari, Advocate-General of Madras, posited. "My view is amendment of the Constitution by itself is a necessity which we should preserve in the early stages of the Constitution. . . . In the Irish Constitution adopted in 1922 there was a transitory provision in Art. 50 which stipulated that the Constitution could be amended by the Irish Parliament for eight years by amendments . . . ; it was increased later to 16 years. There were sixteen amending acts. . . . If the legislations by themselves serve social purposes we should not object to the fact of the amendments of the Constitution at this stage."

Principles of amendment.

Mr. K. V. Venkatasubramany Ayyar while expounding the principles of amendment at the symposium aforesaid stated, "I should pose the following four questions to the Lok Sabha for their consideration: (1) Was the power of making amendment under the Constitution an unlimited one? (2) What was the procedure applicable to the amendments of the Constitution which sought to abridge fundamental rights? (3) Was it proper to have drastic changes effected in the Constitution without ascertaining the will of the people? (4) Was not the most urgently needed amendment to the Constitution an amendment to the amending process itself? Was not there an exaggeration of the principles of equality in current notions of the welfare state very similar to the exaggerations of the principles of liberty that brought *Laissez faire* democracy to its end? If it was true that the claims of liberty should be subordinate to the claims of equality, was it not equally true, as Lord Acton observed, that a 'passion for equality may make vain the hope of freedom' The framers of the Constitution visualized alteration in the Constitution in its important particulars only 'as a distant contingency' It did not follow, however, that even if Parliament had the power to do what the Government desired to do under the Fourth Amendment, the situation should be accepted with protest. What was legal was not necessarily proper. Parliament in England had unlimited power to enact laws but it did not consider itself entitled to enact highly controversial laws without a mandate from the electorate." If the amending process was not clear on this matter, the learned speaker advocated the Irish parallel where every proposal after being passed by the legislature should be submitted for a referendum. He felt that while freedom and equality were worth preserving and advocating there cannot be too much of a fetish made of these so as to destroy the very freedom. He said, "Today they seemed to be witnessing a reversal of the phenomenon which brought *Laissez faire* democracy to its end. Thus organized trade unionism had placed employees on the same footing as their employers in the matter of bargaining power and it was the employer who had become the object of tyranny. There seemed to be something in human nature that loved exaggeration. They seemed to be unable to get rid of one tyranny without exchanging it for another. . . . Was there not an obvious truth in the observation of Laski on liberty that 'only respect for freedom would lend beauty to men's lives'? Equality was no doubt of very great importance but unqualified equality seemed to be as absurd as unqualified liberty."

Mr. T. Subramanya Ayyar, Ex Advocate-General of Travancore-Cochin, observed while speaking in the symposium, "Quoting the view of Dennis

Lloyd' 'a retreat from contractual relationship runs through recent legislation'. Even if they studied the political development in England since 1918, they saw many Governments of diverse shades of colour had a tendency to treat the tenant as the 'spoilt darling of the Law'. That was what was happening in this country (India) now. . . . Far too frequent changes in the Fundamental Right were fraught with uncertainties in the law and arrested the growth of conventions and healthy traditions. The entire principle of *quid pro quo* as well as the requisite basis for compensation had been taken away by the proposed amendment to Article 31. The concentration of power in authorities who believed in catching the eye of the voter and less in ordered progress would very seriously affect the economy of the country and result in the 'equalization of poverty' which Mr. Nehru wished hard to avoid. The denial of the right to test the adequacy of compensation by judicial process removed the only check on power. Too much power corrupts even a saint! However desirable it might be in the public interest to forge new standards of acquisition and distribution of wealth from the economic point of view, both social control by law and individual initiative could not be relegated to the background. The pace of reform, therefore, would have to be modulated and a policy of 'hastening slowly' adopted to sustain an ordered and progressive socialistic order."

Mr. M. K. Nambiar, Bar-at-Law, urged the need for preserving and fostering the principle of judicial review to safeguard the basic freedoms set out in Part III of the Constitution. He said, "The framers of the Constitution being quite aware that a right without a remedy was but sterile and that justice delayed was justice denied, wove into the fabric of the Constitution two golden threads, one conferring a right to move the Supreme Court to issue orders, directions or writs for the enforcement of any of the Fundamental Rights (Art. 32) and the second conferring a similar power on the High Court for the enforcement of such right or for any other purpose to any Government, person, or authority within its territory." Mr. Nambiar deprecated the attempt to whittle down the writ jurisdiction of courts. He added, "To remove or sterilise either of these articles would be to remove or sterilise the fundamental rights guaranteed by the Constitution. In a country like India, in the infancy of her independence, where traditions had yet to be developed and public opinion still to become effective, the height, stature and integrity of the country's leaders of the present, should not blind them to the changes in the future or the grave temptation that lesser men called to power would be exposed to in the absence of any organic restraints against governmental action. . . . Judicial review here, as everywhere, is necessarily the bulwark of our freedom. . . . It is wise to remember what Lord Acton said in his 'History of Freedom', 'The great question is to discover not what Governments prescribe but what they ought to prescribe, for no prescription is valid against the conscience of mankind'."

We may conclude this dissertation of weighty opinions by stating that it is improper, unwise and unconstitutional to so amend Art. 31 as to deprive "just compensation" to any one deprived of his private property and it is worth to make compensation "a gift" by the executive. Compensation to be real must not only be just and fair but should also be justiciable to ensure public confidence.

It must be admitted that the provision in Art. 368 enables Parliament to legislate over large areas of the Constitution (such as Part III and Part IV) without even the need to obtain ratification from the States. Ratification

from the States is indeed restricted to the proviso in Art. 368. The latter relates broadly only to election of the President of the Union; definition of the executive power of the Union and the States; organization and powers of the Supreme Court, and High Courts; Federal distribution of legislative powers and organization of legislative relations between the Union and States; representation of States in Parliament and lastly the amending process itself. But all other provisions in the Constitution stand the risk of amendment without this ratification from the States. Therefore, the power of Parliament is supreme in the matter of amendment. But should it exercise such a power arbitrarily? It has been suggested that amendment of Fundamental Rights may not be tinkered with without specific sanction from the people on the Irish model. To safeguard the rights it may be suggested that Article 368 may itself be amended to enable the formulation of a procedure by referendum to the people for any amendment of any provision of the Constitution particularly those dealt under Parts III and IV.

If this view of the matter be accepted it may also be stated that there is no urgent need to amend Article 31 simply because of the opinion expressed in the *State of Bengal v. Subodh Gopal* (1954 S.C.R. 587 S.C.) that clauses (1) and (2) of Art. 31 are mutually exclusive. There is the minority view in that very judgment that clauses (1) and (2) are really different in concept, that "taken possession of, or acquired" have reference to "requisitioning or acquisition" in clause (2) and that, therefore, it cannot be equated with the word "deprived" in clause (1).

This difference in judicial opinion should not necessarily hurry the governmental party in power to seek an amendment. It is just possible that in an appropriate case the minority view may be shared by a stronger Bench of the Supreme Court. Further as the amended Article 31A reads, the nine categories mentioned therein go far beyond even the minority judgment. It is all too much of an inroad into private ownership beyond reasonable limits. Some patience and an amendment after a process of referendum to the people may probably crystallize the basis for any further social and economic reform. Democracy thrives not by exhibiting a giant's strength in power politics but in the restraint shown in using that power wisely and calmly. A socialistic pattern of society will be nearer achievement if this method is chosen. The latest trend in the objectives of the Indian National Congress (as stated in the 1954 December Madras Session) is that the welfare state visualized is not necessarily a socialistic state but a state with a socialistic pattern of society. The word "socialistic" as such may connote from its historical significance a militant ideology but the words "socialistic pattern" appear to take away the sting of dictatorship and provide a basis for the formation of a truly socialistic welfare state, developed by a gradual process of economic development and planning along the lines of the Directive Principles of State Policy (Arts. 36 to 51). This aspect of development and construction is far different from enforced doctrinaire philosophy with the inevitable concomitants of destruction. Hence it may be suggested that to promote the former and more desirable ideology, the Constitution itself must be worked in a spirit of reverence. Hustled amendments based on ideologies which are yet to be fully tested in very many details, may do a lot of harm to the body politic. A referendum process is the only feasible solution to avoid such pitfalls. This, we have already suggested, is the best way to solve the question at issue. For this reason Article 368 must itself be amended to provide a process of referendum for any constitutional amendment in Parts III and IV of the Constitution.

Report of the Joint Committee of Parliament.

The Fourth Constitution Amendment Bill after much public discussion underwent the scrutiny of the Select Committee of Parliament which submitted its report on 31st March 1955. The most controverted question of adequacy of compensation for requisitioning or acquisition of property by the state being non-justiciable was approved by the Committee. A suitable amendment to Art. 31 (2-A) was recommended to provide that a law providing for acquisition or requisitioning shall not be called in question in any court on the ground that the compensation provided by it is not adequate. However, certain types of acquisition or requisition of property right were excepted from the operation of Art. 31A. These items relate to acquisition of agricultural holdings, fixation of maximum extent of agricultural holdings and disposal of property declared to be slums, transfer of any undertaking wholly or in part from one company to another and rights accruing out of agreement or lease or licence for the supply of power, light or water. The effect of this change would, however, bring in the operation of Art. 14 (discrimination) and Art. 19 (right to acquire, hold and dispose of property) and a safeguard against this is provided.

Three minutes of dissent have been appended to the report by five members, two of them against the proposals of the Joint Committee while the third, a joint minute by three members (Communist M.Ps.), welcoming the change made by the Committee but suggesting that it should be more radical by retaining as fundamental right only the protection against executive acquisition or requisition of property without the authority of law.

Recommending the addition of a proviso to the new Article 31 (2) the report says, "The Committee feels that although in all cases falling within the proposed clause (2) of Article 31 compensation should be provided, the quantum of compensation should be left to be determined by the legislature and it should not be open to the courts to go into the question whether the compensation provided in the law is adequate or not. The clause as amended by the Joint Select Committee reads thus:

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which the compensation is to be determined and given, and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate."

In the opinion of the Committee the new Clause (2-A) sufficiently brings out the distinction between compulsory acquisition and requisition of property for public purposes and the deprivation of property or property rights by operation of regulatory or other laws. It was, however, considered necessary that the clause should be expanded to cover transfer of ownership or right to possession of property to corporations owned or controlled by the state. Such corporations stand on the same footing as a Government. As this is not covered by the definition of "state" in Art. 12, the clause has been suitably amended.

The Committee also directed deletion of the words "by the states" in the clauses as all cases of acquisition or requisition could only be by the state.

On the question of amendments to Article 31-A the Committee stated, "In view of the decision to place questions as to adequacy of compensation

outside judicial review, the Committee have carefully considered the need for including the various categories of law listed in Clause (1) of Article 31-A. In their opinion the reference in sub-clause (b) to agricultural holdings, sub-clauses (c), (d) and (e) and the reference in sub-clause (g) to the transfer of undertakings from one company to another and the reference in sub-clause (1) to agreements or licences for the supply of power, light, or water to the public are not now necessary and have therefore been omitted.

"There are further minor changes such as including secretaries and treasurers of companies to the list of other officers whose extinguishment or modification of rights cannot be called in question."

Clause (1) of 31-A as recommended by the Joint Committee reads thus:

"Notwithstanding anything contained in Article 13, no law providing for (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights; or (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property; or (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations; or (d) the extinguishment or modification of any rights of managing agents, secretaries, treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders therein or the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31: provided that where such law is a law made by the legislature of a State, provisions of this article shall not apply thereto unless such law having been reserved for the consideration of the President has received his assent."

Discussion in Parliament on the Joint Committee Report.

The predominant majority in Parliament was behind Prime Minister Nehru when he moved for the acceptance of the Bill as amended by the Joint Committee. Mr. Nehru gave a categorical assurance in the Lok Sabha that there would be no confiscation or acquisition of property without payment of compensation. He, however, added that only the quantum of compensation would be determined by the legislature. Mr. Nehru expressed his personal views in rather trenchant terms. "I have no respect for property at all except perhaps for some personal belongings, but I respect other person's property occasionally. But that is another matter. The House will forgive me if I say I have no property sense. It is a burden to me to carry property about. In life's journey one should be lightly laden. One cannot be tied down to a patch of land or building or something else. So I cannot appreciate this tremendous attachment to this property sense. But I realise and recognise that it is there."

This gives an inkling as to how Mr. Nehru's personal philosophy has in a measure affected the course of the constitutional amendment under reference. He said, "By and large, if you think of governing this country democratically, you should trust the legislature. This legislature may decide matters of far greater importance such as the question of war and peace. Surely the Supreme Court will not decide that. . . . To single out the question of compensation to be given for property and take it out of the purview of the legislature

seems to be a basically wrong approach unless, of course, you think property is something semi-divine and the protection of private property is the highest good of the nation, which obviously, hardly anyone can say."

Mr. Nehru parenthetically added, "In cases of industrial undertakings, banks and the like, (citing the case of the Imperial Bank) they were paying pretty full compensation in whatever form it might be. Generally speaking, it would be completely wrong in the case of what might be called the smaller owners not to give them full compensation." In the matter of foreigners' property in India, Mr. Nehru assured that it was a matter of honour to respect these on the ground of fairness and also on the ground of avoiding international tensions and repercussions so that India's credit in the international world might be safe and stable. Otherwise foreign investments and international trade in India might be adversely affected.

On the question of quantum of compensation Mr. Nehru's view was very pronounced. "The ultimate authority to lay down what political, social or economic law we should have is Parliament and Parliament alone. It is not the function of the judiciary to do that. While full compensation might be given for individual acquisition under normal laws, in changes involving the social structure they could not think in terms of full compensation. Apart from their inability, payment of full compensation would really mean that the 'Have Nots' would always continue to be 'Have Nots' while the 'Haves' would remain always 'Haves'." He added this amendment did not mean curtailing or challenging powers of courts. Only the sphere of social or economic reform was in the sole control of the legislature with no judicial interference in it. Might be, the Supreme Court in its interpretative jurisdiction would have its say but the ultimate decision in such matters must remain with Parliament. He added, "You cannot, if you are aiming at changes in the social structure, think in terms of giving full compensation, first because you cannot do it; secondly, it will be improper and unjust to do so, and it should not be done even if you can do it." (Nehru was loudly cheered when he uttered these words).

In regard to the criticism that the compensation might be illusory or unreal Pandit Pant, Home Minister, said, "Members seem to suspect their own capacity and determination to do the right. The collective wisdom of Parliament must in such cases be deemed to be equal to the task it will have to perform."

There was no doubt, trenchant criticism by stalwarts as Messrs. N. C. Chatterjee, Frank Anthony and others. Mr. Chatterjee said, "The main purpose of the declaration of Fundamental Rights was to place the rights beyond the reach of the majority so that the Prime Minister may not stand up in this Parliament and say 'I have a majority and I will tamper with Fundamental Rights'." Mr. Chatterjee was not against acquisition but against the non-justiciability of compensation. He forcibly said, "You are arrogating power not to yourself but to state legislatures. You are permitting almost arbitrary and confiscatory powers for the State. If you block the courts and deny to ordinary men access to courts of law, you will make them over to the tender mercies of the executive. It will be an evil day in India if the Prime Minister or anybody else thinks we should not allow the Supreme Court to function in this sphere. The Supreme Court of the U.S.A. has been allowed to function and no catalysm has happened."

Mr. Frank Anthony wondered if Art. 31 (2-A) did not give blanket powers to the legislature for expropriation. It was a complete ouster of jurisdiction of the court. Might be some fifteen years hence an extremist political party in power might interpret the word "compensation" to mean "no compensation."

Mr. Hiren Mukherjee, M.P., felt that the poorer peasants stood the risk of being inadequately compensated if the quantum is left non-justiciable. Dr. Ambedkar, the architect of the original Constitution, pleaded for just compensation. He said, "In Russia as the state provided all essential requirements to the citizens, the question of compensation never arose. In the United Kingdom the Labour Party gave full compensation in every case of nationalisation."

Pandit Pant, in his reply, stated, "Let us accept the real truth that Parliament is the sovereign authority. Whatever rights are possessed, they are really carved, sustained, accepted and maintained by Parliament. If you accept this, then let us also accept that the ultimate authority in these matters must rest in Parliament." Prime Minister reiterated that the Bill aimed at giving compensation and not to deny it. "Criticism of the Bill by judges of the Supreme Court would only result in counter-criticism by some plain speaking from outside. Our esteem for the Supreme Court has not lessened by even a jot. But if certain results accrue from the decisions of this court which we do not like, then the responsibility in all such things is clearly Parliament's and not the Court's."

A motion for further circulation of the Bill for public opinion was negatived and the Lok Sabha on 12th April, 1955, passed the Bill (291 votes to 5 votes), satisfying the constitutional requirement of acceptance of the majority of the total membership of the House and a further majority of not less than two-thirds of the members present and voting. The Rajya Sabha (Upper House) unanimously passed the Bill (by 139 votes against nil) on 20th April, 1955.

The effect of the Amendment.

The Bill as it originally stood was in a way criticised as discriminating between agricultural and industrial property. For it was impossible to nationalise Banking and Insurance except on payment of full compensation. But the State could, on the other hand, take over what in their opinion was "surplus land" for distribution among the have-nots paying as much or as little compensation as they chose. The Joint Committee's drastic change in this regard erases this distinction between agricultural and industrial property rights. The quantum of protection or no protection is now of the same degree in both the cases. But that is no consolation to the former. For as Patanjali Sastri, C.J., opined, "If the quantum of compensation is to be left to the discretion of the State and made non-justiciable there will be little left of the guaranteed protection of private property." Though Mr. Nehru was quite clear that small landowners should be given full compensation there is no such exception demarcated in the new Article, not to speak of the havoc created by making compensation non-justiciable. The safeguard of Presidential assent to State laws which authorise expropriation of property in the interest of "social engineering" is indeed illusory. The President can hardly antagonize the express will of the cabinet or Parliament. Also the States will also resent Presidential veto negating their cherished autonomy. The majority party

will hardly use their strength in moderation or restraint respecting the reasonable desires of the minority. Mere assurances that the power will not be exercised except in cases of their public necessity and that industrial undertakings will not be taken up except in rare cases of "strategic importance" can hardly be a solace. To take compensation out of the field of justiciability is hardly calculated to inspire public confidence. For the legislature's attitude in respect of compensation cannot be so much based on objective factors as on ideological and *a priori* considerations. To make compensation justiciable does not mean that courts are given power to revise the legislature's wishes. The very grant of fundamental rights diminishes the sovereignty of Parliament and the function of the court is to see that the provisions of the Constitution are faithfully carried out to the letter and in spirit. We must only conceive courts of justice as a co-ordinate power under the Constitution along with the Executive and the Judiciary. If this power of court is disturbed or struck down wholly or in part, there is bound to be a corresponding disturbance of the balance of the Constitution endangering orderly constitutional life in a welfare state. As Parliament has the ultimate law-making power and the power of constitutional amendment, and thereby circumventing decisions of courts of law, what is most necessary is the growing of an immutable healthy constitutional convention among all the political parties not to effect changes in the Constitution except in extreme cases of dire necessity in national interests.

The Constitution Amendment as finally passed by Parliament.

The Constitution (Fourth Amendment) Act, 1955.

(Received the assent of the President on the 27th April 1955. Published in the Gazette of India, Extraordinary, Part II, Sec. 1, page 183, dated 28th April, 1955).

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the sixth year of the Republic of India as follows:—

Short title.

1. This Act may be called the Constitution (Fourth Amendment) Act, 1955.

Amendment of Article 31.

2. In Article 31 of the Constitution, for clause (2), the following clauses shall be substituted, namely:—

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2-A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property notwithstanding that it deprives any person of his property."

Amendment of Article 31-A.

3. In Article 31-A of the Constitution,—

(A) For clause (i), the following clause shall be, and shall be deemed always to have been, substituted, namely:—

“(i) Notwithstanding anything contained in Article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:

Provided that where such law is a law made by the Legislature of a state, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent”; and

(B) In clause (2)—

(i) in sub-clause (a), after the word “grant”, the words “and in the States of Madras and Travancore Cochin, any Janmam right” shall be, and shall be deemed always to have been, inserted; and

(ii) in sub-clause (b), after the word “tenure-holder” the words “raiyyat, under-riyyat” shall be, and shall be deemed always to have been, inserted.

Substitution of new article for Article 305.

4. For Article 305 of the Constitution, the following Article shall be substituted, namely:—

“305. *Saving of existing laws and laws providing for State monopolies.* Nothing in Articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing in Article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause (6) of Article 19.”

Amendment of the Ninth Schedule.

5. In the Ninth Schedule to the Constitution, after entry 13, the following entries shall be added, namely:—

“14. The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 1950).

15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U.P. Act XXVI of 1948).

16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act LX of 1948).

17. Sections 52-A to 52-G of the Insurance Act, 1938 (Act IV of 1938), as inserted by Section 42 of the Insurance (Amendment) Act, 1950 (Act XLVII of 1950).

18. The Railway Companies (Emergency Provisions) Act, 1951 (Act II of 1951).

19. Chapter III-A of the Industries (Development and Regulation) Act, 1951 (Act LXV of 1951), as inserted by Section 13 of the Industries (Development and Regulation Amendment) Act, 1953 (Act XXVI of 1953).

20. The West Bengal Land Development and Planning Act, 1948 (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951.”

Judicial Interpretation

In *Ramji Lal v. The Income Tax Officer*⁶⁶ the Supreme Court has held that clause (1) of Article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise Art. 265 becomes wholly redundant. The Constitution has treated taxation as distinct from compulsory acquisition of property and has made independent provision giving protection against taxation save by authority of law. The protection against imposition and collection of taxes save by authority of law directly comes from Article 265 and is not secured by Art. 31 (1). Article 265 not being in Part III of the Constitution its protection is not a fundamental right which can be enforced by an application to the Supreme Court under Article 32.

In *G. Kistareddy and others v. Commissioner of City Police, Hyderabad*,⁶⁷ it was posited that Art. 31 (1) protects the property rights of persons. This duty is cast upon all the three branches of the State, i.e., the legislature, the executive and the judiciary. If the first two in any way transgress the limits of the Constitution or violates any of the fundamental rights, it is the duty of the court to declare it so.

In *Dwarkadass v. Sholapur S. & W. Co.*⁶⁸ the Bombay High Court has held that “deprivation” is of wider significance than “acquisition” or “taking possession”. “We have the American principle of *Eminent Domain* reproduced in Art. 32 (2) and we have the principle of police power reproduced in Art. 31 (1). It is perfectly true that our legislatures have to be confined to the three Lists which are embodied in the Seventh Schedule. But we

66. 1951 S.C.J. 203. See A.I.R. 1955 S.C. 3 *Laxmanappa v. Union of India and Sikhar Chand v. Bank of Baghelkhand*, C.A. 47 and 30 of 1950 Vin. Pradesh.

67. A.I.R. 1952 Hyd. 36 *Vide also Gesulal v. State of Hyderabad*, A.I.R. 1951 Hyd. 89 p. 91.

68. A.I.R. 1951 Bom. 86. 92.

are only speaking of the principal underlying Art. 31 (1). Therefore, although it may seem that the powers are drastic it is clear these powers of depriving the subject of his property without compensating him would only arise provided the legislature is satisfied that in public interest the property of a subject has to be destroyed or his title would have to be extinguished. In another case⁶⁹ the same court observed, "The courts must also be careful to see that any deprivation of property by the state is not too easily put in the category of deprivation referred to in Art. 31 (1) so as to entitle the state to take possession of the property of the subject without the very salutary limitations laid down upon its power under Art. 31 (2)."

The scheme of taking over evacuee property is not deprivation. It is mere custody and administration and not confiscation. There is in it neither "deprivation" as under Art. 31 (1) nor taking possession or acquisition as under Art. 31 (2).⁷⁰ The provisions of the Bihar Private Forest Act, 1948,⁷¹ or of the Rajasthan Tenants' Protection Ordinance, 1948,⁷² were also held as not amounting to acquisition of property. The West Bengal Land Developments and Planning Act does not contravene Art. 31 (1).⁷³ In *Gopalan v. State of Madras*⁷⁴ Sec. 4 of the Madras Estates Land (Reduction of Rent) Second Amendment Act, 1951, was considered only as a provision pertaining to the relationship of landlord and tenant and that it would not amount to a provision for acquisition of any interest in land by the Government. The right to collect and appropriate tender leaves under the C.P. States Land Tenure Order (1949) was held not to offend Art. 31 read with Art. 19 (1) (f) and (g) as the Raiyat merely continued to have the same fettered or limited right which he had enjoyed prior to the commencement of the Constitution.

In *Mahindra Mohan v. State of Assam*⁷⁵ the Assam Management Estates Act, 1949, was held *intra vires* as the transference to public ownership of certain estates and tenures for purposes of management by the State Government was an act of acquisition falling within item 9 of List 2 of Sch. 7 of the Government of India Act, 1935. The latter contemplates not only the acquiring of the whole title of the expropriated but also taking possession of a right or rights less than the totality of the rights constituting property. But under the Constitution such taking possession short of entire proprietary right is not acquisition but "requisition" which is included in item 36 List 2 of Sch. 7. "Acquisition" in Entry 36 means and implies the acquiring of the entire title of the expropriated owner whatever the nature or extent of that title might be.

The meaning of 'property' has been judicially specified. In *Chiranjit Lal v. Union of India*⁷⁶ 'property' referred to in Art. 19(1)(f) and Art. 31 is that which can by itself be acquired, disposed of, or taken possession of. It cannot apply to mere right to vote for the election of directors, the right to pass resolutions and the right to present a petition for winding up etc., as they are all personal rights flowing from the ownership of the share. It is not the "share" itself.

Even when a person has been deprived only of his right to possess and enjoy property, it amounts to deprivation of property within Art. 31 though

69. *Abdul Majid v. P. R. Nayak*, A.I.R. 1951 Bom. 448, 449.

70. *M.B. Namazi v. Deputy Custodian, Evacuee Property*, A.I.R. 1951 Mad. 930. See also *Samsuddin v. Asstt. Custodian, E.P.*, A.I.R. 1953 Sau. 73.

71. *Shri Durgaji v. State of Bihar*,

A.I.R. 1935 Pat. 65.

72. *Ghamandi v. Parshadi*, A.I.R. 1953 Raj. 53.

73. A.I.R. 1953 Cal. 704.

74. A.I.R. 1953 Mad. 260.

75. A.I.R. 1953 Assam. 84.

76. A.I.R. 1951 S.C. 41: 1950 S.C.R. 869.

he continues to be the owner of the same.⁷⁷ To force a millowner to work the mills with the result that it would be made to suffer losses amounts to depriving of property.⁷⁸ Where owner is deprived of effective possession and management on account of Government taking over control, and even saddling the owner with all losses in Government running the mills, it reduces the owner to one having no voice in the management. This is clear breach of Art. 31 (1).⁷⁹ In a Calcutta case⁸⁰ it has been held that Art. 31 contemplates the existence of the requisite powers in the legislature of the country to pass law authorizing deprivation of property and such power cannot be limited by reference to Entry 33 of List I or Entry 36 of List 2.

In *Prithvi Singh v. State*⁸¹ it has been held that Art. 31 (1) enacts a general rule that no person shall be made to lose his property, either temporarily or permanently or with or without compensation, except by authority of law, while clause (2) deals with particular kinds of deprivation. The statute law under which a person can be deprived of his property must be valid and enforceable law.

In *Hira Singh Bam v. State of H.P.*⁸² it was held that where A purchased State House from Government with a reservation of right of Government to repurchase (by a specific term in the sale deed), and the Deputy Commissioner gave a notice to quit within a month to A who was in proprietary possession, it was clearly *ultra vires* for want of lawful authority offending Art. 31 (1).

In *State of Bihar v. Kameshwar Singh*,⁸³ Mahajan, J., adverting to power of the state in respect of compulsory acquisition of property observed, "This power is a sovereign power of the state. Power to take property for police use has been exercised since olden times. Kent speaks of it as an inherent sovereign power. An incident of this power of the state is the requirement that property shall not be taken for public use without just compensation.

On the Continent the power of the compulsory acquisition is described by the term *Eminent Domain*." This term seems to have originated in 1625 by Hugo Grotius who wrote of this power in his work '*De Jure Belli Et Pacis*' as follows: "The property of the subjects is under the *Eminent Domain* of the state so that the state or he who acts for it may use and even alienate and destroy such property not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done, the state is bound to make good the loss to those who lose their property."

In *Chiranjit Lal v. Union of India*⁸⁴ B. K. Mukerjee, J., put it, "It is the right inherent in every Sovereign to take and appropriate the private property belonging to individual citizens for public use. The right which is described as '*Eminent Domain*' in American law, is like the power of taxation,

77. *Birdhichand Bansilal v. Municipal Committee of Ajmere*, A.I.R. 1954 Ajmere 3 (1).

78. *Maharaj Kishangarh Mills Ltd. v. State of Rajasthan*, A.I.R. 1953 Raj. 188.

79. *Surajmal v. Rajasthan State*, C. M. Writ application 65/51.

80. *Narayanoprasad Jhunjhunwalla*

v. Indian Iron & Steel Co., A.I.R. 1953 Cal. 695.

81. A.I.R. 1953 Pepsu 161 (D.B.).

82. A.I.R. 1953 H.P. p. 57.

83. A.I.R. 1952 S.C. 252: 1952 S.C.R. 889.

84. A.I.R. 1951 S.C. 41: 1950 S.C.R. 869.

an offspring of political necessity and it is supposed to be based upon an implied reservation by Government that property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner."

Mukherjee, J., added in the instance case,⁸³ "It cannot be disputed that in every Government there is inherent authority to appropriate the property of the citizens for the necessities of the state and constitutional provisions do not confer this power though they generally surround it with safeguards."

Patanjali Sastri, C.J., put it,⁸³ "The exercise of such power (compulsory acquisition by state) has been recognized in the jurisprudence of all civilized countries as conditioned by public necessity and payment of compensation. All legislation in this country authorizing such acquisition of property from Regulation 1 of 1824 of the Bengal Code down to the Land Acquisition Act, 1894, proceeded on that footing."

In *Virendra Singh v. State of Uttar Pradesh*⁸⁵ the Supreme Court has held that the absolute *muafi* grants of lands made by the Rulers of the erstwhile States of Charkari and Sairola which were independent States under the Paramountcy of the British Crown, before the integration of the States into United States of Vindhya Pradesh and the subsequent accession to the Indian Dominion, cannot be revoked as act of state by the State of Uttar Pradesh in consultation with the Government of India after the coming into force of the Constitution. The accessions and the acceptance of them by the Dominion of India were acts of state into whose competency no Municipal Court can enquire, nor can any court in India after the Constitution accept jurisdiction to settle any dispute arising out of them because of Art. 363 and the proviso to Art. 131. The agreement contained in the Instrument of Accession is sacrosanct. All they can do is to register the fact of accession. It has been further held that no State Government has a right to do anything in the nature of an act of state.

In *Wazir Chand v. State of H.P.*⁸⁶ it was held that illegal seizure of goods in possession of petitioner in India under no authority of law at instance of the Jammu and Kashmir police was clearly an infringement of both Art. 19 and Art. 31.

In *Baijayananda v. State of Bihar*⁸⁷ it has been posited that under the Bihar Hindu Religious Trusts Act, the Board does not take possession of the endowed properties, it does not perform any act of management with reference to the endowed properties. The Board merely exercises the power of superintendence as provided in Sec. 28 (1) of the Act. There is no acquisition or requisition of property right within the meaning of Art 31. In other words, the impugned Act is legislation made in exercise of the police power and not in exercise of the right of *Eminent Domain*.

In *Rao Manohar Singh v. State of Rajasthan*⁸⁸ it was held that the right to manufacture liquor for private and domestic consumption and the compensation given in lieu for prior custom of manufacture for general consumption, which was extended to Jagirdars in the State of Udaipur by the Ruler of former Udaipur—these amenities were in the nature of privileges granted only to the petitioner Jagirdars individually and granted under executive orders under the pleasure of the Ruler. After the Constitution and after the State was integrated into the State of Rajasthan, the Government withdrew

85. A.I.R. 1954 S.C. 447.

86. A.I.R. 1954 S.C. 415.

87. A.I.R. 1954 Pat. 266.

88. A.I.R. 1954 Raj. 85.

the privileges by a notification. It was held that so-called right of private distillation was not a right at all in any strict or legal sense of the term, but merely a privilege to be enjoyed during the pleasure of the Ruler. It was, therefore, held that Art. 31 was not attracted and there was no need to consider in detail whether it was a right to property within the meaning of Art. 31.

In *Bridhichand Bansilal v. Municipal Council, Ajmere*,⁸² it was held where the Municipal authorities seized a cycle merely because it was on Municipal land and the owner owed "the Bazari tax", the seizure was illegal as it was not done by authority of any valid law. Sec. 179 (2) of the Municipal Act merely authorized to summarily remove encroachments but not to seize property and Sec. 234 prescribed the method of realization of taxes of which seizure of goods was not one. Further even when a person had been deprived only of his right to possess and enjoy the property, it amounted to deprivation of property within Art. 31 though he continued to be the owner of the same.

In *Dwarkadad Srinivas v. Sholapur Sp. & Wg. Co.*⁹⁰ the import of Arts. 19 and 31 and the significance of clauses (1) and (2) of Art. 31 were variously canvassed by the Judges of the Supreme Court. Mahajan, J., opined, "Article 31 deals with private property of persons residing in the Union of India while Art. 19 only deals with citizens defined in Art. 5 of the Constitution. The scope of these two articles cannot be the same as they cover different fields. It cannot be seriously contended that so far as citizens are concerned freedoms regarding enjoyment of property have been granted in two articles of the Constitution, while the protection to property *qua* all persons has been dealt with in Art. 31 alone. If both these articles covered the same grounds it was unnecessary to have two articles on the same subject. . . . Art. 31 deals with the field of *Eminent Domain* and the whole boundary of the field is demarcated by this Article. In other words, the state's power to take the property of a person is comprehensively delimited by this Article."

Bose, J., put it, "Article 19 (1) (f) confers a certain fundamental freedom on all citizens of India, namely, the freedom to acquire, hold and dispose of property. Article 31 (1) is a sort of corollary, namely, that after the property has been acquired it cannot be taken away save by authority of law. Article 31 is wider than Art. 19 because it applies to every one and is not restricted to citizens. But what Art. 19 (1) (f) means is that whereas a law can be passed to prevent persons who are not citizens of India from acquiring and holding property in this country, no such restrictions can be placed on citizens. But in the absence of such a law no non-citizen can also acquire property in India and if they do then they cannot be deprived of it any more than citizens save by authority of Law."

Adverting to clauses (1) and (2) of Art. 31 Ghulam Hussain, J., observed, "Art. 31 is self-contained, and clause (1) refers to deprivation of property in general. Acquisition or taking possession in Cl. (2) are different modes of deprivation and are comprehensive enough to include all forms of taking away rights of property."

Per Mahajan, J., "Art. 31 is a self-contained provision delimiting the field of *Eminent Domain* and Art. 31 (1) and (2) deals with the same topic of compulsory acquisition of property. The words 'acquisition' and 'taking possession' used in Art. 31 (2) have the same meaning as the word 'deprivation' in Art. 31 (1). Article 31 gives complete protection to private property

as against executive action, no matter by what process a person is deprived of possession of it. . . . Article 31 states the limitations (public purpose and payment of compensation) on the power of the state in the field of taking property and those limitations are in the interests of the person sought to be deprived of his property. The question whether acquisition has a larger concept than is conveyed by the expression 'taking possession' is really of academic interest in view of the comprehensive phraseology employed by clause (2) of Article 31." Here Mahajan, J., dissents from the observation of Bose, J., in A.I.R. 1951 S.C. 41 and A.I.R. 1952 S.C. 252.

But Bose, J., opined in the instant case, "The possession and acquisition referred to in clause 2 mean the sort of 'possession' and 'acquisition' that amounts to 'deprivation' within the meaning of Cl. (1). No hard and fast rule can be laid down. Each case must depend on its own facts. But if there is substantial deprivation then clause (2) is attracted. By substantial deprivation, I mean the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to or an interest in property. The form is unessential. It is the substance we must seek." Ghulam Hussain, J., would put it, "Both parts (1) and (2) of Art. 31 should be read so as to harmonize with that intention (namely, the protection of property against invasion by the state). . . . I am not prepared to subscribe to the proposition that 31 (1) stands by itself and should be read separately from (2) and I cannot attribute an intention to our Parliament to deprive a person of his property namely by passing an Act. The two parts of the article form an integral whole and cannot be dissociated from each other. . . . It is not possible to lay down any inflexible test which may be universally applicable. When it can be shown that the statute substantially interferes with the right of enjoyment of property, it will be hit by Art. 31 (2) and declared void, unless compensation is paid."

In *State of West Bengal v. Subodh Gopal*⁹¹ (the details of which case we have already adverted to in prior pages) the majority opinion of the Supreme Court was to the effect that "the abridgement sought to be effected retrospectively of the rights of a purchaser at a revenue sale (details already stated) is not so substantial as to amount to a deprivation of his property within the meaning of Art. 31 (1) and (2). No question accordingly arises as to the applicability of Cl. (5) (b) (ii) of the article to the case in question." But the dissenting Judge, S. R. Das, opined, "If the impugned section operates as an extinguishment of the right of the purchaser to property, treating the right to annul under-tenures and to eject under-tenants and to execute the decree for ejectment as property, then these rights of the purchaser have not been taken possession of or acquired by the State within the meaning of Art. 31 (2) but he has been deprived of his property by authority of law under Art. 31 (1) which calls for no compensation."

Again the majority of the Supreme Court were of the view that "Art. 19 (1) (f) declares the citizen's right to own property and has no reference to the right to the property owned by him which is dealt with under Art. 31.

Under the scheme of our Constitution, all these broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the state under Cl. (1) of Art. 19, the powers of state regulation of these freedoms in public interest being defined in relation to each of those freedoms by clauses (2) to (6) of that article, while rights

of private property are separately dealt with and their protection provided for in Art. 31, the cases where social control and regulation could extend to the deprivation of such rights being indicated in para. ii sub-cl. (b) of cl. (5) of Art. 31 and exempted from liability to pay compensation under Cl. (2)."

It was, therefore, held, "sub-clause (f) of Cl. (1) of Art. 19 has no application to the question of validity of Sec. 7 of the Amending Act 7 of 1950. The question whether Sec. 7 of the Amending Act is a reasonable restriction on the exercise of the purchaser's right to the property purchased by him cannot also arise. (S. R. Das and Jagannath Das, JJ., dissenting).

Again, on the question of Art. 31 clauses (1) and (2) the majority Bench was of this view: "The American doctrine of police power as a distinct and specific legislative power is not recognized in our Constitution and it is, therefore, contrary to the scheme of the Constitution to say that clause (1) of Art. 31 must be read in positive terms and understood as conferring police power on the legislature in relation to rights of property. It is the legislature alone that can interpose and compel the individual to part with his property. It is this limitation which the framers of our Constitution have embodied in Cl. (1) of Art. 31 which is thus designed to protect the rights to property against deprivations by the state acting through its executive organ, the Government. Clause (2) imposes two further limitations on the legislature itself. It is prohibited from making a law authorizing expropriation except for public purposes and on payment of compensation for the injury sustained by the owner. These important limitations on the power of state acting through the executive and legislative organs to take away private property are designed to protect the owner against arbitrary deprivation of the property. Clauses (1) and (2) of Art. 31 are thus not mutually exclusive in scope and content but should be read together and understood as dealing with the same subject, namely, the prosecution of the right to property by means of the limitations on the state power referred to above, the deprivation contemplated in Cl. (1) being no other than the acquisition or taking possession of property referred to in clause (2)."

But of the minority, S. R. Das, J., opined, "It is not correct to say that clauses (2) to (6) of Art. 19 recognize the police power of the State in that they permit it to make laws imposing restrictions on the seven rights of the citizens and that they at the same time regulate that power by placing limitations upon it by requiring that the restrictions which may be imposed must be reasonable and that the state's police power is further saved by Art. 31 (5) (b) and that the police power having been recognized and provided for in Art. 19 and Art. 31 (5) (b) there is no necessity to read Art. 31 (1) as concerned with the state's police power at all."

In *Haji Suleman Yusuf Bhar v. Custodian of Evacuee Property, Madhya Bharat, Gwalior*,⁹² it was held that where the Custodian ignores the provision of Sec. 7 of the Administration of Evacuee Property Act, 1950, and declares the leasehold of the shop as evacuee property he acquires no jurisdiction to pass any order and acts not only in violation of the principles of natural justice but he also violates petitioner's fundamental right of being deprived of property save by authority of law.

In *Kuldip Singh v. Punjab State*,⁹³ it has been held that the Government do not "acquire" within the meaning of Art. 31, the property of a ward whose

estate is taken under the superintendence of the Court of Wards. They merely manage the property for, and on behalf of, the ward. Secondly, it is obvious that although the restrictions which are imposed on the right of a spendthrift to acquire, hold and dispose of property cause a certain amount of inconvenience to him these restrictions are imposed for the benefit of the public and the landholder must be deemed to be compensated in participating in the general advantage.

In an Allahabad case⁹⁴ it was held that an order under Sec. 3 of the U.P. Industrial Disputes Act 28 of 1947 was *intra vires* as one under a valid law even if Art. 31 is deemed applicable to it.

In *Thacker Valji Korji v. Collector of Kutch*⁹⁵ it has been held that when a Collector without any authority of law puts the property of a person to sale for recovery of Government dues, it is an illegal executive act offending Art. 31 (1).

In *Mast Ram v. State of H.P.*⁹⁶ it has been held that a person in whose favour a grant of land is validly made by the former Ruler of Jubal cannot, by an executive order, be deprived by the State Government after the merger of the State in the Union. On such revocation of the grant Articles 19 (f) and 31 (1) come into play. And an appropriate writ will be issued to the State Government restraining it from taking any action against the petitioner in pursuance of the orders passed by its officer.

In *M. Mohd. Ishwaq v. Commissioner of Income Tax, Delhi*,⁹⁷ it has been posited that the provisions contained in Sections 22 (4) and 22 (2) are not idle formalities which may or may not be complied with as the Income Tax Officer may desire. On the contrary, they appear to have been enacted with the express object of affording protection to the tax-payer against capricious and arbitrary assessment. If unfairly used these provisions can deprive the assessee of what is intended to be assured to him. If an Income Tax Officer recovers any tax except in accordance with the procedure established by law it is a taking of property in contravention of Art. 31.

In *S. Raghuir Singh v. Union of India*⁹⁸ it has been held that Art. 31 does not affect Sec. 9 of Evacuee Interest (Separation) Act. The petitioner has not been deprived of his property. All that the legislature has done is to reduce the rate of interest on the monies advanced by him.

In *Brij Bhukan v. S.D.O., Siwan*,⁹⁹ it has been pointed out that the American doctrine of police power as a distinct and specific legislative power is not recognised in our Constitution. It would be wrong to say that Cl. (1) of Art. 31 must be read in positive terms and understood as conferring police power on the legislature in relation to rights to property. Even clause (1) of Art. 31 is designed to protect the rights to property against deprivation by the state acting through its executive organ and clause (2) imposes two further limitations on the legislature itself. Clauses (1) and (2) are not mutually exclusive in scope and content and should be read together and understood to be dealing with the same subject,

94. *Basti Sugar Mills Ltd. v. State of U.P.*, A.I.R. 1954 All. 538.

95. A.I.R. 1954 Kutch 11.

96. A.I.R. 1954 H.P. 84.

97. A.I.R. 1954 Punj. 296.

98. A.I.R. 1954 Punj. 261. A.I.R. 1947 P.C. 72 followed.

99. A.I.R. 1955 Pat. following A.I.R. 1954 S.C. 92 and 119.

namely, the prosecution of the right to property by limitation on the state power.

In a recent Vindhya Pradesh case¹⁰⁰ it has been posited that the making of a grant being the sovereign act of the Ruler it can only be revoked by the Ruler. No executive act of the Government can revoke the terms of the grant except when it is so authorized by law.

When property is requisitioned the person affected is deprived of his property and Art. 31 (1) is attracted and not Art. 19 (1) (f).¹ A taxing statute does not deprive property. Article 31 deals with deprivation of property otherwise than by way of levying or collecting taxes.² Legislative restriction of transfer of property by an evacuee is quite reasonable under Art. 19 (5) and it cannot be deemed as deprivation at all.³ The first clause in Art. 31 is meant to guard against taking away one's property arbitrarily or by executive action. There must be legal sanction for every act of deprivation.⁴ The Berar Ali enacted Villages Tenancy Law, was construed as regulatory and not confiscatory.⁵

When the Government under the Motor Transport Vehicle Control Order (1944) has directed the owner of an omnibus to deliver his bus to a dealer and has fixed the price at which the said vehicle could be sold, since the sale cannot take place till the Government nominates the particular buyer, the effect of the order is to deprive the owner of the bus of his property for an indefinite period, and hence the Government was held liable to pay compensation.⁵

The Allahabad High Court has held that the U.P. (Temporary) Accommodation Requisition Act XXV of 1947 does not come under or infringe Art. 31.⁶ But this view is wrong since after the 1955 Amendment of Art. 31, the Article includes both acquisition and requisition of property. In acquisition there is deprivation of the proprietorship of the owner while in requisition there is only temporary deprivation of the right to exercise ownership.⁶

Passage benefit is not "property". It is at best a right which a member of the Indian Civil Service may be entitled so long as he is in service and on terms as stated in the Superior Civil Services (Revision of Pay and Pension Rules).⁷

Under the Land Acquisition Act it is only when possession is taken after the declaration of intention to acquire the land that the vesting takes place. So it was held that a mere declaration under Section 3 of the Act does not vest the property in the State.⁸

100. *Raghavendra Singh v. Pushpendra Singh*, A.I.R. 1955 V.P. 19.

1. *K. P. Doctor v. State of Bombay*, A.I.R. 1955 Bom. 221. *Mangulal Karwa v. State of Madhya Pradesh*, A.I.R. 1955 Nag. 153. But see *Kather Dutt v. Dist. Magistrate*, A.I.R. 1956 All. 233.

2. *Bengal Immunity & Co. v. State of Bihar*, A.I.R. 1955 Nag. 153. Following *Ramji Lal v. I.T.O.*, A.I.R. 1951 S.C. 97.

3. *Sadhu Ram v. Custodian General*

of *Evacuee Property*, A.I.R. 1956 S.C. 43.

4. *State of W.B. v. Lakshmi Narayan Singh*, A.I.R. 1956 Cal. 87.

5. *Bhutya v. Radha Kishan Lal*, A.I.R. 1956 Nag. 50.

5. *Ibid.*

6. *Mrs. Katha Dutt v. Dist. Magistrate*, A.I.R. 1956 All. 232.

7. *N. Bakshi v. Acct. General*, A.I.R. 1957 Pat. 515.

8. *Neelakanth Mali v. Jagannath Singh*, A.I.R. 1957 Raj. 59.

In *Venkatachalamayya v. State of Madras*⁹ Subbarao, C.J., adverted to a comparative study of the two decisions of the Supreme Court in *State of West Bengal v. Subodh Gopal Bose*¹⁰ and *Dwarakadas Srinivas v. Sholapur and Weaving Co. Ltd.*¹¹ and said that except Das, J., all the other learned Judges rejected the narrow meaning of the word "acquisition" i.e., transfer of the title from the owner and vesting the same in the state, and adopting the more comprehensive one viz., the procuring of property or the taking of it permanently or temporarily by the state. The word "acquisition" in sub-section (2) of Sec. 299, Government of India Act 1935, in view of the Supreme Court judgment must be held to mean any deprivation of the property of a citizen and therefore such deprivation cannot be effected by any act without conforming to the limitations laid down under that section. *Visvanatha Sastri*, J., opined⁹ that substantial deprivation of property right was what was meant by the word "acquisition" occurring in Art. 31 (2) of the Constitution and S. 299 (2) of the Government of India Act. From the point of view of the person who is deprived of his property, it may not be material whether the state acquires title to it or makes use of the property or allows another person to enjoy the benefit. The decision in *Raja of Bobbili v. State of Madras*¹² is overruled on this point.

An order for an employer to contribute one anna in the rupee of his employee's wages to a Provident Fund to which the employee also has to contribute the same amount out of his wages does not amount to deprivation of property as was contemplated when Article 31 was drawn up.¹³

ARTICLE 31 (2)

FOREIGN CONSTITUTIONS

U. S. A.

The Fifth Amendment of the Constitution of the U. S. A. posited :

"..... Nor shall Private properties be taken for Public use without just compensation."

Australia.

Sec. 51 (3) of the Australian Constitution Act, 1950, endows the Commonwealth Parliament with the power of "acquisition of property on just terms from any state or persons for any purpose in respect of which Parliament has power to make laws".

Eire.

Art. 44 (2) of the 1937 Constitution posits:

"The property of any religious denomination or any educational institution shall not be deprived, save for necessary works of public utility and on payment of compensation."

9. A.I.R. 1958 And. Pra. 173 (F.B.): (1958) 1 An. W.R. 88.
10. A.I.R. 1954 S.C. 92: 1954 S.C.J. 127.
11. A.I.R. 1954 S.C. 119: 1954 S.C.J. 175.
12. A.I.R. 1952 Mad 203: (1952) 1 Mad L.J. 174. But Krishna Rao, J., opined in this case that in S.

- 299 (2) acquisition imports the idea of transference of some of owner's right in property, remains unaffected by the decision of the Supreme Court.
13. *Haji Nadir Ali Khan v. The Union of India*, A.I.R. 1958 Punj. 177.

Japan.

Art. 29 of the 1946 Constitution states:

"Private property may be taken for public use upon just compensation therefor."

Burma.

Art. 23, clauses (4-5) of the 1948 Constitution postulates :

(1) "Private property may be limited or expropriated if the public interest so requires but only in accordance with law which shall prescribe in which cases and to what extent the owner shall be compensated.

(2) "Subject to the conditions set out in the last preceding sub-section individual branches of national economy or single enterprises may be nationalized or acquired by the State by law if public interest so requires."

Rumania.

Sec. 10 of the 1948 Constitution of the Republic says:

Expropriations for reasons of public utility may be made in virtue of a law, on payment of just compensation determined by the judiciary.

Czechoslovakia.

Sec. 9 of the 1948 Republican Constitution says:

(1) Private ownership may only be restricted by law.

(2) Expropriations may only take place in virtue of the law and on payment of compensation, unless it is laid down by law that compensation shall not be payable.

(3) No person shall misuse the right of property to the detriment of the community.

Federal Republic of Germany.

Sec. 14 of the 1949 Constitution says:

(3) Expropriation is only permissible for the good of the community. It can only be effected by legislation or in virtue of a law, prescribing the nature and amount of compensation. When fixing the compensation a just balance shall be found between the interests of the community and those of the persons concerned. As regards the amount of compensation, proceedings in the ordinary courts shall be available in the event of dispute.

Sec. 15 : For the purpose of socialization, landed property, natural wealth and means of production may be transferred to public ownership or other forms of collective economy by law prescribing the nature and amount of compensation. Art. 14 (3) third and fourth sentences shall apply *mutatis mutandis* as regards the compensation.

Hungary.

Sec. 8 of the 1949 Constitution of the Republic states:

(1) The Constitution recognises and protects all property acquired by work.

(2) Private property and private enterprise must not be harmful to the public interest.

German Democratic Republic.

Sec. 23 of the 1949 Constitution posits :

(1) Property restrictions and expropriations can only be imposed for the good of the community and in virtue of a law. They shall be accompanied by suitable compensation unless the law otherwise determines. In case of dispute as to the amounts of compensation, the procedure for legal remedies in the ordinary law courts shall be available unless a law otherwise prescribes.

Sec. 24 states :

(1) Property involves responsibilities. It shall not be used in a manner contrary to the common good.

(2) The misuse of property by establishing a situation of undue economic power to the detriment of the common welfare results in expropriation without compensation and transfer of the property to public ownership.

Costa Rica.

Sec. 45 of the 1949 Constitution says :

..... No one shall be deprived of his property save in the public interest lawfully proved with prior compensation in conformity with the law. In case of war or internal disorder, it is not necessary that compensation should precede: Provided that payment must be made within two years after the end of the period of emergency.

The Government of India Act, 1935.

Sec. 299 cl. (2) posits :

"Neither the Federal nor a Provincial Legislature shall have the power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which and the manner in which it is to be determined."

COMMENTARY ON FOREIGN CONSTITUTIONS.

U. S. A.

The Fifth Amendment postulates the state's power of *Eminent Domain* by which it can "take" private property, for public use, but on payment of just compensation. No such "taking" is possible by any others than the Government. In *Bangor and P. R. Co. v. Mc Comb*¹ the court said, "As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighbourly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel, or require any man to part with an inch of his estate." But different considerations prevail when it is the Government of

1. 60 Me 290.

the state who requisition or acquire the property for "public use". The property of incorporated companies was regarded as property for the purposes of *Eminent Domain*. "A contract is also property and like any other property may be taken under condemnation proceedings for public use. Its condemnation is of course subject to the rule of just compensation"². It is clearly established that "taking private property for public use" is not *per se* taking without "due process". It only becomes such when proper procedural methods are not provided or when the taking is not for a public use or in the case of *Eminent Domain* when adequate compensation is not made³.

In *U. S. v. Great Falls Mfg. Co.*⁴ it was posited that "property is taken when the title to it is transferred to Government or Government takes over or assumes to control its valuable uses or when in the case of land it commits a deliberate and protracted trespass". 'Taking' does not necessarily connote total deprivation. Any infringement of any right of property is taking⁵, even it falls short of appropriation. Thus compensation could be asked under the Fifth Amendment in a case where the back water from a public dam permanently floods a Private land⁶. But no compensation could be asked where the injury is due to natural causes or merely consequential⁷. The amount of damage is not at all the criterion. It is only the character of the 'invasion' that constitutes 'taking'. Thus in a case of firing of guns from the nearby fort over the petitioner's land the 'invasion' is tangible though the damage may not be much⁸. So also where airplanes skim private land during its flights will substantially affect the user of the land on account of the frequency and altitude of the flights⁹. Though 'taxation' by Government involves 'taking of property' it is different from the concept of *Eminent Domain* and no compensation is called for since taxation ultimately goes to promote the general benefits accruing to the community.

If private property is subordinated to some public right, the exercise of the public right will not amount to "taking"¹⁰. It is the legislature and not the courts that has to determine the sufficiency of public benefit to warrant the "taking"¹¹ or to determine the manner and the extent of exercise of the power of *Eminent Domain* in relation to the demand of public necessities¹¹.

The term "public use" is of importance. It is a justiciable matter¹². The general criterion is for the court to accept the declaration of the legislature as to what is a "public use" unless it is palpably wrong¹³ or an impossibility¹⁴. When property is put directly to the use of the community as a whole for its welfare or convenience, it is a "public use" such as construction of schools, public buildings, parks, markets, bridges, canals, railways, drainage, etc. The "taking" for public use need not necessarily connote that each citizen should have the right to use or enjoy the improvement in question¹⁵, or

2. *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685.

3. See Willoughby's 'Constitutional law of U.S.A.', p. 795 Student Ed.

4. (1884) 112 U.S. 645.

5. *Pumpelly v. Green Bay Co.*, (1871) 13 Wall. 166.

6. *Ibid.*

7. *Bedford v. United States*, (1904) 192 U.S. 217.

8. *Portsmouth Harbour Co. v. U.S.* 267 U.S. 327.

9. *U. S. v. Causby*, (1946) 328

U.S. 256.

10. *Chandler v. Dunbar*, (1913) 229 U.S. 53.

11. *Fairchild v. St. Paul*, 46 Minn. 540.

12. *Kohl v. U.S.*, (1875) 91 U.S. 367.

13. *U.S. v. Gettysburg Ry.*, (1896) 160 U.S. 668.

14. *City of Cincinnati v. Vester*, (1930) 281 U.S. 439.

15. *Clark v. Nash*, (1905) 198 U.S. 361.

that the "use" must be "present" in the sense that the public may utilize now of its services¹⁶, or that the "use" is occasioned by a public agency¹⁷. Even a private person's use may bring about public benefit¹⁸.

What is just compensation is to be determined judicially. This judicial power cannot be taken away by statute law nor can the executive arrogate to itself the final power to assess the compensation. What is just and proper compensation is justiciable. It is the owner's loss and not the taker's gain which is the yardstick for the value of the property taken¹⁹ as on the date of the "taking"¹⁹. "Compensation" is not a limitation on the power to "take" but is only a "condition" for its exercise. It is, however, not exactly a condition precedent. It is enough if the state directs the regular ascertainment of the quantum, with the least delay and also gives any aggrieved owner the right to judicial remedy²⁰.

In *State v. McCook*²¹ it has been posited that it was for the legislature to determine what was a public purpose and that was conclusive. It can also delegate the determination to some other body. The purpose may include matters of health, recreation etc. The allowance of a sum of one dollar for the acquisition of a railway company's right of way was held constitutional as within the purview of legislative powers²². What is just compensation is for the legislature to decide and this has absolutely no bearing on the validity of the legislation. In *Eastern Railroad Co. v. Boston*²³, it has been pointed that the legislature alone have to determine what is public benefit and can even delegate this function to designated officers or tribunals. The judiciary cannot question the legislative competence in this regard, nor even the "reasonableness" involved in it unless it is shown that the alleged "public use" is an impossibility²⁴.

In *Chappali v. United States*^{24a} Justice Grey observed, "It is well settled that, whenever in the execution of the powers granted in the United States for fort, magazine, backyard, lighthouse, customhouse, post office, or any other public purpose, cannot be acquired by agreement with the owners, the Congress of the United States, exercising the right of *Eminent Domain* and making just compensation to the owners, may authorize such lands to be taken, either by proceeding in the courts of the State with its consent. The power extends to every species of property and every character of right, title or interest therein which a citizen may possess".

Butler, J., in *Sea Board Air Line Co. v. U. S.*^{24b} opined that the levy of compensation must take into consideration not only the value of the property to the owner (not the buyer) as it existed on the date of taking but also the interest due thereon till date of payment. But state cannot acquire for any private purpose. The purpose must be clearly "public". Thus *Missouri Pacific Ry. Co. v. Nebraska*^{24c} has held that a State legislature cannot acquire for private purposes even on payment of compensation.

16. *In re* opinion of the Justices, (1910) 204 Mass. 607.

17. *Charokee Nation v. S. Kansas R. Co.*, (1890) 135 U.S. 641.

18. *Strickley v. Highland Gold Mining Co.*, (1906) 200 U. S. 527.

19. *U.S. v. Miller*, (1943) 317 U.S. 369.

20. *Sweet v. Rechel*, (1895) 159

U.S. 380.

21. 64 A.L.R. 1453.

22. *Chicago Railway Co. v. Chicago*, 166 U.S. 226.

23. 15 Amer. Rep. 13.

24. *Green v. Fraizer*, 253 U.S. 233.

24a. 160 U.S. 409.

24b. 261 U.S. 299.

24c. 164 U.S. 403.

England.

Blackstone in his commentaries has enunciated the principle as to why compensation should be paid for acquisition of private property for public use²⁵. "..... So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extremely beneficial to the public. But the law permits no man, or set of men to do this without the consent of the owner of the land..... Besides public good is nothing more essentially interested than in the protection of every individual's private rights as modelled by the municipal law..... In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce..... All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price and even this is an exertion of power, which the legislature indulges with caution and which nothing but the legislature can perform."

Mr. Broom in his 'Constitutional law' has put it, "Next in degree to the right of personal liberty is that of enjoying private properties without undue interference or molestation, and the requirement that properties shall not be taken for public use without just compensation is but an affirmation of the great doctrine established by the common law for the protection of private property. It is founded in natural equity and laid down as a principle of universal law."

In *Attorney General v. De Keyser's Hotel*²⁶ it was posited that property could not be acquired even for war purposes without compensation to the owner. Parliament has vouchsafed in the Defence of the Realm Consolidation Act, 1916, compulsory acquisition only on compensation. Lord Dundin in *Cedars Rapids Manufacturing and Power Co. v. Lacoste*^{26a} laid down the principle that the levy of compensation must be with reference to the value to the owner as it existed on the date of the taking, not the value to the taker. Though the value to the owner includes the advantages which the land possessed present or future, it was the present value alone that was to be the criterion.

Australia.

Section. 51 (3) of the Commonwealth Constitution empowers (1) "on just terms" acquisition of property, (2) from any state or person, (3) for any purpose in respect of which Parliament has power to make laws. The terms to be "just" must be "reasonable". This again is justiciable and cannot be withdrawn from the court's purview²⁷. If "compensation" levied is unjust the whole act including the acquisition will be void and rendered nugatory²⁸. It is left to the legislature to fix the time, manner, occasion and necessity for the exercise of powers of acquisition. In *Grace Bros. Property, Ltd. v. Commonwealth*²², it has been held that Parliament has power to regulate the terms of compensation and that the court will not hold such legislation invalid unless it is such that a reasonable man could not regard its terms as

25. See his commentaries, Book I, p. 139.

26. (1920) A.C. 508. See *Att. General v. Wiltz United Dairies*, (1921) 91 L.J.K B. 897.

26a. (1914) A.C. 569.

27. *Australian Marketing Board, v. Tonking* (1942) 66 C.L.R. 77.

28. *Grace Bros. v. Commonwealth*, (1946) 72 C.L.R. 269. See also *Johnstone v. Commonwealth*, (1943) 67, C.L.R. 314.

being just. If the law imposes unjust terms the law is void²⁹. Of course, the requirement of "just terms" applies only when the Commonwealth has acquired property pursuant to statutory powers. If the Commonwealth has acquired property pursuant to a contract, express or tacit, then the price payable is governed by the contract³⁰. There can be acquisition of something short of the totality of rights in a particular property.

Placitum 31 of Sec. 51 of the Australian Constitution was interpreted in *Dalziel* case^{30a} to this effect: "There is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating". In the instant case^{30a} it was held that a regulation that made it "difficult", if not impossible, for a wool owner except under the direction of the Government and on terms offered by the Government amounts to "requisition".

India.

Section 299 of the Government of India 1935 Act and Art. 31.

Art. 31 is an improvement on Sec. 299. It includes "movable property" within its purview. Art. 31 provides "compensation" while, Sec. 299 provides "for the payment of compensation." Sec. 299 refers to "compulsory acquisition" while Art. 31 refers to "taking possession" or "acquisition." Both insist on a "public purpose" as condition precedent.

The Principle of clause 2 Art. 31, before the Constitution 4th Amendment.

This clause reiterates the principle of *Eminent Domain*. The law of acquisition in India of private property for public purposes had always recognized the justness of compensation. This was so even prior to the passing of the Constitution. The various Land Acquisition Acts of the States point to this. This was considered as an attribute of sovereignty to requisition or acquire land for known public purposes. The justification was found in the paramount interests of the public and the necessities of Government³¹. This attribute of the state is symbolic of sovereignty and so it cannot contract away this right of *Eminent Domain*³². In *Chiranjit Lal v. Union of India*³³ the Supreme Court of India held, "It is the inherent right in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right which is described as *Eminent Domain* in American law, is, like the power of taxation, an offspring of political necessity and it is supposed to be based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner."

But once property is taken or acquired under clause (2) compensation has to be paid, whether the public benefit therefrom is big or not. The measure

29. *Minister of State for the Army v. Dalziel*, (1944) 68. C.L.R. 261.

30. *Commonwealth v. Huon Transport Ltd.*, (1945) 70 C.L.R. 293.

30a. *Minister of State v. Dalziel*, (1944) 68 C.L.R. 261. Referred to by Mukherjee, J., in *Chiranjit Lal v. Union of India*, A.I.R.

1951 S.C.L.1 (55-6). See *John Cook v. Commonwealth*, (1922) 31 C.L.R. 394, *McClinton v. Commonwealth*, (1948) 75 C.L.R. 1.

31. *Ramachandra v. Secretary of State*, (1905) 29 Bom. 480.

32. *Pennsylvania Hospital v. Philadelphia*, (1917) 245 U.S. 20.

33. A.I.R. 1951 S.C. 41.

of compensation is not occasioned by the degree of public benefit. There is no other way open to acquire except by payment of compensation³⁴. For it will be unfair that the individual whose property is acquired should be in a way compelled to contribute more than any other to public expenditure³⁵. The question of compensation will not arise when property has to be destroyed on grounds of public safety.

The exceptions to this rule of compensation are set out in clause 5 of Art 31. They are—

1. Provisions of any law which impose or levy any tax or penalty.
2. Provisions of any law intended to promote public health or the prevention of danger to life and property.
3. Evacuee property.

Any law excepting the above which enjoins the "taking" or "acquiring" of property for public purpose but which does not provide for "compensation" will be void as is explicitly stated in Art. 32 (2). While the power to acquire or requisition is set out in Entry 33 List I and Entry 36 List II, the power to levy compensation is concurrent (Entry 42 of List III) which can be exercised only on the conditions set out in clause 2 of Art. 31³⁵. The stipulated conditions in Art. 31 (2) in acquiring or taking property are

- (a) the existence of a public purpose³⁵,
- (b) payment of compensation.

The other requisites are that the taking or acquiring must be of

- (a) "property";
- (b) the property must be "taken" or "acquired".
- (c) this acquisition or taking must be under "some law".

If the acquisition is under a "contract" and not under a law, then no question of a public purpose or compensation arises³⁶. The owner or occupier can demand then only the "Price" payable under the contract. Compensation is different and is often more than the "price value". "Compensation" takes in other factors such as the loss occasioned to the giver, not the gain accruing to the "taker". The permanent loss which it puts to the "giver" is also a factor to be reckoned with. It is clear that Art. 31 (2) has no application when the property is taken for "private" purposes. There can be no law of compulsory acquisition of private property for private purposes³⁷.

We shall now deal with the connotations of terms like "acquire", "taking possession of", "property" "public purpose", etc.

"Acquire".

Acquisition involves transfer of rights of ownership. It may be the whole right or part of the right. "Lease holds" can thus be acquired though they fall short of the full ownership. It may be for a "public purpose" a "leasehold" acquisition will suffice³⁸. There is then no need to deprive the totality

34. *Kameshwar v. State of Bihar*, A.I.R. 1951 Pat. 91.

35. *State of Bihar v. Kameshwar*, A.I.R. 1952 S.C. 252.

36. See *Commonwealth v. Huon Transport*, (1945) 70 C.L.R.

293.

37. *West Bengal Co-op. Societies v. Bella*, A.I.R. 1952 Cal. 554.

38. *Surya Pal v. State of U.P.*, (1952) 7 D.L.R. 469.

of rights centred in a person. Thus in *Surya Pal's* case³⁸ only the proprietary rights of Zamindars was acquired, leaving intact the Bhumidari right in them. Acquisition implies the transfer of the whole bundle of Rights while 'taking Possession' merely wrests the enjoyment from the true owner leaving intact the latter's paramount title³⁹. The transfer of rights to connote acquisition must be to a tangible person or body⁴⁰. Mere increase of land revenue payable is not acquisition⁴⁰. Mere regulating the relations between the landlord and tenant incidentally diminishing the rights hitherto exercised by the landlord does not come under the category of "acquisition of the land"⁴¹. The settlement of industrial disputes or the awards passed under the Industrial Disputes Act, 1947 (Act XIV of 1947), may affect the pecuniary rights of parties but do not imply "deprivation of property" or "acquisition" under Art. 31.⁴²

"Taking possession of".

This is short of taking ownership of property. The owner is merely excluded from possession or enjoyment of the property. But this taking possession must be real or substantial. The loss of some minor ingredients of proprietary rights is not "taking possession". There must be substantial dispossession of proprietary rights^{42a}. This term covers requisitioning of property also⁴³. In *Chiranjit Lal's* case^{42a} it was held that the right to deal with share or to enjoy dividends was substantial taking of proprietary rights in a "share" and this 'share' was considered as "property". But mere right to vote for the election of directors for management of the company is only a privilege and is not a substantial proprietary right, which if deprived would amount to "taking possession of". The "taking possession of" must be "property" which, according to Art. 19 (1) (f) and Art. 31 must be one that can be acquired, disposed or taken possession of^{43a}. When Government merely takes up the management of a company, it is not taking possession of the proprietary rights within the meaning of Art. 31 (2)⁴⁴. Entry 33 of List I and entry 36 of List II refer to the power of requisition which term includes "taking possession of".

Mere taking up of management of an estate or tenure, whether the proprietor is a "disqualified proprietor" or not, there is not "taking possession".^{43a} Where the right to dividend or the right to dispose of his share in the insurance company is intact, the mere vesting of the management to an Administrator does not deprive the shareholder of his "property" nor is there "taking possession of the property" by the Administrator within the meaning of Art. 31⁴⁵.

In *State of West Bengal v. Subodh Gopal*⁴⁶ the Supreme Court opined, "the word 'acquisition' and its grammatical variations should in the contexts of Art. 31 and entries in the 7th Schedule be understood in their ordinary sense and the additional words 'taking possession of' or 'requisition' are used in Art. 31 (2) and in the entries respectively not in contradistinction with but in amplification of the term 'acquisition' so as to make it clear that the words taken together cover even those kinds of deprivations which do not involve the continued existence of the property after it is acquired. The expression

39. *Chiranjit Lal v. Union of India* (1950) S.C.R. 869.

40. *Lal Singh v. C. P. and Berar* A.I.R. 1944 F. C. 61.

41. *Jagannath v. United Provinces*, (1946) 50 C.W.N. 674.

42. *Meenakshi v. State of Madras*, A.I.R. 1951 Mad. 974.

42a. (1950) S.C.R. 849.

43. *Shyam v. State of Punjab*, A.I.R. 1952 Punj. 70.

43a. *Chiranjit Lal v. Union of India* (1950) S.C.R. 869.

44. *Kameshwar v. Prov. of Bihar* A.I.R. 1950 Pat. 392.

45. *Jupiter Ins. Co. v. Rajagopalan*, A.I.R. 1952 Punj. 9.

46. A.I.R. 1954 S.C. 92.

'taking possession of' can only mean taking such possession as the property is susceptible of and not actual physical possession as the 'interest in or in any company owning, any commercial or industrial undertaking' which is expressly included in cl. (2) of Art. 31 is not susceptible of any actual physical occupancy or seizure. The expression 'shall be taken possession of or acquired' in cl. (2) does not admit of being construed in the same wide sense as the word 'taken' used in the Fifth Amendment of the American Constitution but implies such an appropriation of the property or abridgement of the incidents of its ownership as would amount to a deprivation of the owner. Any other interference with enjoyment of private property short of such appropriation or abridgement would not be compensable under Art. 31 (2)".

The majority view in the instant case⁴⁶ was also to the effect: "The words 'acquired' or 'taking possession' used in cl. (2) of Art. 31 cannot be construed on a narrow technical sense. It cannot be assumed that the ordinary word 'acquisition' was used in the Constitution in the same narrow sense in which it may have been used in pre-Constitution legislation relating to acquisition of land. These enactments related to land, whereas Art. 31 (2) refers to movable property also, as to which no formal transfer or vesting of title is necessary. Nor is there any warrant for the assumption that 'taking possession of property' was intended to mean the same thing as 'requisitioning property' referred to in the Entries of the Seventh Schedule".

But S. R. Das, J., was of the view, "The word 'acquired' used in Art. 31 (2) must be given the special meaning which that word has acquired and cannot be read as synonymous with 'taken' as used in the fifth Amendment to the Constitution of the United States. The expression 'taken possession of or acquired' occurring in cl. (2) have not the same meaning which the word 'deprived' used in cl. (1) has. 'Taken possession of or acquired' should be read as indicative of the concept of 'requisition or acquisition'".

Jagannath Das, J., opined in the instant case⁴⁶, "Undoubtedly 'taking possession' and 'acquisition' amount to 'deprivation', but the converse may not follow in the particular contest in which these words and phrases are used. While the framers of the Constitution laid down the requirements of the authority of law for 'deprivation of property' with a larger connotation, they limited the requirement of payment of compensation to what may reasonably be comprehended within the concepts of 'acquisition' and 'taking possession'. To read these words and words in Art. 31 (2) as meaning the same thing as 'deprivation' used in Art. 31 (1) and to make the test of substantial 'abridgement' or 'deprivation' as the *sine qua non* for payment of compensation under Art. 31 (2) is to open the door for introduction of most, if not all, the elements of wide uncertainty which have gathered round the word 'taken' used in the corresponding context in the American Constitution".

Effect of Constitution Fourth Amendment on Art. 31 Cl. (2).

The incidents of clause (2) of the Article as newly amended are :

1. There shall be no compulsory requisition or acquisition except for a public purpose.
2. In such cases there shall be a law providing for compensation, fixing the amount or specifying the principles on which and the manner in which the compensation is to be determined.

3. Such law shall not be called in question in any court on the ground that the compensation is inadequate.

Taking now the effect of clauses (1) and (2) of Article 31 it would be clear that—

1. Where the property is not taken for a public purpose and where the deprivation of property by authority of law falls short of acquisition or requisition under clause (2) there is no constitutional obligation to pay compensation.
2. This does not mean that the Government need not pay compensation. It is entirely left to their discretion. There is no constitutional right to question the validity of the law for not providing for compensation in such cases.
3. Clauses (1) and (2) of Art. 31 are not, therefore, one and the same. The deprivation of property in clause (1) is to be construed in the widest sense as including any curtailment of a right to property even where it is caused by a purely regulatory provision in law and is not accompanied by an acquisition or taking possession of that or any other property right by the state. Only when it is an acquisition or requisition for a public purpose is clause (2) of Art. 31 attracted.
4. Where the law in question does not transfer ownership or right to possession of any property to the state or to a corporation owned or controlled by the state, there is no question of compulsory acquisition or requisition notwithstanding that a person is thereby deprived of his property. Consequently, no question of any right to compensation arises. This is the effect of clause (2A) of Article 31.

Hence this may result in denial of compensation to a person who is made to lose the benefit of his ownership or his right to possession without the right being transferred to the state or corporation owned or controlled by the state. The new clause (2A) brings out the distinction between compulsory acquisition and requisition of property for public purposes and the deprivation of property or property rights by operation of regulatory laws. As 'state' is not defined in Art. 12 to include corporations owned or controlled by the state, Art. 31 (2A) makes this specifically clear.

The Constitution Fourth Amendment has completely shut out the jurisdiction of courts in questioning the quantum of compensation in all cases covered by the new clause (2) of Article 31. This fixation of compensation is completely left to the law-making body, the legislative Parliament at the Centre and the legislatures at State level. But where acquisition or requisition is for a public purpose and the law does not provide for compensation, the legality of such a law can be questioned in a court of law. If the law merely specifies the principles on which and the manner in which the compensation is to be determined and given, the court cannot question this either. It may, however, see if these principles and the manner of determination of compensation set out by the law have in actual practice been carried out by the concerned authority. The quantum of compensation may be adequate or grossly inadequate. This is no concern of the court. This in effect gives a *carte blanche* power to the party in power with a majority in the legislature to interfere with private property ownership in any manner it chooses. If it is for a public purpose all that the law should do is to provide some kind of compensation, however illusory it may be. If it is not for a public purpose under the guise of regulatory power falling

short of acquisition or requisition the executive can easily deprive a person of his property even without a shred of 'compensation'.

The underlying object of this amendment is stated to be to speed up socialization of property. How far this is feasible or just is yet to be seen. To consider payment of full compensation as unjust or not necessary is altogether a new conception. Society which has hitherto been built up on a solid foundation of sanctity of private property has necessarily to readjust itself under the new dispensation of socialistic ideologies. If society is not to break, much depends on the way in which Art. 31 (2) is worked out in practice. If the poor man's land (a few cents) is to be taken away and that too without proper compensation, it is something. But the Constitution as amended allows even that. If the rich man's properties are to be acquired or requisitioned with a 'straw-compensation' then too, it may be unjust and may create undue strain in the equilibrium of society. Just compensation is the only talisman that can cure all ills. What is 'just' compensation is not now an enforceable right. What the party in power and the law provide, must be deemed to be 'enough compensation' though not just. No one shall question this. It therefore reduces the position to this. It is left to the whim of the party in power to deal with private property in any manner it chooses for the good or bad of society. The alleged democratic sanction in the electorate to turn out a party which misuses this power, is not real. Once elected to Parliament, there can be no unseating till the next election, say five years hence. There is no provision in the Constitution which enables the voters in a constituency to demand resignation of any elected member.

The salutary power vested in courts to determine the justness or fairness of the compensation, was the only check. It is lamentable to record that this power is taken away by the new amendment. One cannot expect that equanimity, detachment and justness of attitude which we can look to in our courts of law which have for long established such a tradition, in the conglomeration of political parties which house the legislatures. They cannot have that poise, wisdom and sense of justice untrammelled by political exigencies, party advancement, individual idiosyncracies, and power politics. To draw a conception that Parliament is as good as our Supreme Court of Justice is to vest the former with too much of power which may even ultimately turn out to be a negation of true democracy, degenerating into a sort of totalitarianism generated by the madness of power politics. It is no good for a party in power to urge 'we will use our powers wisely'. For no one can predict how that very party will behave. "Power corrupts" and there is no guarantee that no other party will get into power. Political parties manned by unscrupulous persons may as well wreck democracy and abuse the power vested in them by clause (2) of Article 31. This may end in chaos and injustice.

Possibly we have painted a gloomy picture. But that is quite a possibility. A constitution should provide for all contingencies and should not have loopholes. We look to the democratic masses to be ever vigilant and see that these and similar provisions in the Constitution are not abused.

Fourth Amendment not retrospective.

The Constitution (Fourth Amendment) Act, 1955, is not retrospective under Art. 31 (2) as amended by the insertion of the new Art. 31 (2A). In a Patna case it was therefore held as manifest that the proceedings taken under S. 3 of the Bihar Koshi Area (Restoration of Lands to Raiyats) Act before 27th April, 1955 were *ab initio* void, illegal and without jurisdiction. The Fourth

Amendment and the Bihar Koshi Area Act XXX of 1951 came into force on the same day viz. 27th April, 1955⁴⁷.

The amended Article 31 (2) after the Fourth Amendment has now made it clear that mere deprivation of property is not acquisition unless the deprivation is accompanied or followed by acquisition of the property by the State⁴⁸. The amendment not being retrospective, the right of parties for the period before the amendment would be governed by the unamended Art. 31 (2)⁴⁸.

Requisitioning vis-a-vis Acquisition.

Article 31 cl. (2) is wide enough to include requisitioning of property. It will be noted that the entries in the legislative lists in Sch. VII to this Constitution also refer to the requisitioning of property⁴⁹ as well as acquisition of property. But in the Government of India Act, 1935, item 9 in List 2 of Sch. VII appertains only to the compulsory acquisition of land. This led to a Bombay decision⁵⁰, which held that the State legislature had absolutely no power to make a law for the requisitioning of property. But under Art. 31 a law could provide for both acquisition and requisitioning on a compulsory basis. The following decisions approve of such requisitioning⁵¹. But even for such requisitioning there must be compensation paid and there must also be a public purpose behind it⁵². If the requisitioning is for "any purpose" and not a public purpose it is *ultra vires* of Art. 31 cl. (2) unless it is saved by any of the clauses (3) to (6) of Art. 31⁵³. But if it is an existing law already in force then Art. 31 (5) (a) saves it⁵⁴. The words "taking possession of" in Art. 31 cl. (2) are wide enough to include "requisitioning". The former word though not synonymous with the latter is of wider import. But in the Government of India Act of 1935, Sec. 299 (20) used the expression "acquisition"⁵⁵.

The word "acquisition" differs from "deprivation" in that in the former the transfer is of ownership. Removal of a Matadhipathi from office will be deprivation of property, not acquisition of property⁵⁶. Administration of evacuee property is also not compulsory acquisition but merely transfer of management⁵⁷. There must be a substantial interference with property which destroys or lessens its use and value or by which the owner's right to use or enjoy it is abridged or destroyed in any substantial degree⁵⁸. Regulating relationship between landlord and tenant by a statute is not compulsory acquisition

47. *Sm. Chhaya Devi v. State of Bihar*, A.I.R. 1957 Pat. 44.

48. *Anand Kumar Bindal v. Employees' State Insurance Corporation*, A.I.R. 1957 All. 136 (D.B.). See *Jain Transport and Trading Co., Mathura v. State of U. P.*, A.I.R. 1957 All. 320.

49. See *Kameshwar Singh v. Province of Bihar*, A.I.R. 1950 Pat. 392.

50. *Ten Bug Tain v. Collector of Bombay*, A.I.R. 1946 Bom. 216.

51. *Abdul Hamid v. State of West Bengal*, A.I.R. 1953 Cal. 223. *Nataraja v. Madras State* A.I.R. 1953 Mad. 252. *Shyam Krishen v. State of Punjab*, A.I.R. 1952

Punj. 70. Jeevan Ram v. United States of Rajasthan, A.I.R. 1952 Raj. 137.

52. *Abdul Hamid v. State of W.B.*, A.I.R. 1953 Cal. 223.

53. *State of Bombay v. Heman Santilal*, A.I.R. 1952 Bom. 16.

54. *Heman v. State of Bombay*, A.I.R. 1951 Bom. 121.

55. *Dwarakdas v. Sholapur S. and Lakshmindra Theertha Swami-W. Co.*, A.I.R. 1951 Bom. 88.

ar v. Commr., H.R.E. Madras. A.I.R. 1952 Mad. 613.

57. *Abdul Majid v. P. B. Nayak*, A.I.R. 1951 Bom. 440.

58. See *Rajah of Bobbili v. State of Madras*, A.I.R. 1952 Mad. 203.

or taking possession⁵⁹. Nor does accommodation control empowering allotment of houses amount to acquisition or requisitioning property⁶⁰. Choses in action can be compulsorily acquired. Thus Patanjali Sastri, C.J., and Das, J., opined in *State of Bihar v. Kameshwar Singh*⁶¹, that arrears of rent due from tenants of Zamindars can be compulsorily acquired by the state. But the majority of judges in the instant case held such acquisition to be *ultra vires*. In the U. S. A. also Prof. Willis and Cooley are of opinion that choses in action cannot be acquired under the power of *Eminent Domain*. But Nichols is of contrary view⁶² as cited in the instant case⁶¹.

Crown grants and property of Rulers of merged States.

Crown grants are not exempt from the principle of *Eminent Domain*. It has to be noted also that the state's power of *Eminent Domain* is not subject to any contracted obligation of the state in favour of the person whose property the legislature authorises the Government to compulsorily acquire for a public purpose. But Art. 362 appears to be an exception to this principle in that it provides :

"In the exercise of the power of Parliament or of the Legislature of a State to make laws or in exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred in clause (1) of Art. 291, with respect to the personal rights, privileges and dignities of the Ruler of an Indian State".

Therefore, provisions in the covenant of merger precluding acquisition, will prevent acquisition of property against a former Ruler of an Indian State. But if the covenant stipulates that certain properties are to be treated as private property of the Ruler, there is no prohibition against acquisition as no breach of covenant is committed by acquisition of private properties⁶³. Art. 352 also does not in terms apply to the rights of property of such Ruler. It refers only to his personal rights, privileges and dignities.

Rusums mentioned in the Hyderabad (Abolition of Cash Grants) Act 33 of 1952 are Crown cash grants which do come within the definition of "property"⁶⁴. These were subject to resumption at the pleasure of the Crown. But with the introduction of the Constitution, the Crown prerogatives of resumption disappeared. Hence their resumption under the impugned statute was held unwarranted. The elements of hereditability and enjoyment of the benefit without any rendition of services is sufficient insignia of property to invest these cash grants with the characteristics of property as used in Art. 31. That the Act was passed under Entry 42 of List II is immaterial since that entry is subject to the guarantees held out under Part IV of the Constitution. Hence deprivation of such property must also be compensated⁶⁴.

"Property".

It is not only the totality of rights or bundle of rights in any movable or immovable property of individuals or of companies commercial or industrial

59. *Jagannath Baksh v. United Provinces*, A.I.R. 1943 F.C. 29.

60. *Raman Das v. State of Uttar Pradesh*, A.I.R. 1952 All. 703.

61. A.I.R. 1952 S.C. 252.

62. His book 'Eminent Domain' citing *Cincinnati v. Louis Ville and N. R. Co.*, (1912) 56 Law

Ed. 481:223 U.S. 390. (Cited in A.I.R. 1952 S.C. 252 (para. 99)).

63. *State of Bihar v. Kameshwar Singh*, A.I.R. 1952 S.C. 252.

64. *Munga Bai v. Hyderabad State*, A.I.R. 1955 Hyd. 44.

undertakings, but includes anything short of such full rights such as leaseholds, mortgage etc. Any tangible interest⁶⁵ in property is enough to attract the definition for the purpose of Art. 31 (2). It may be tangible or intangible property [(vide discussion under Art. 19 (1) (f)]. The goodwill of a business is property⁶⁶. Taking possession for temporary period constitutes acquiring interest in property as possessory interest passes. Compensation is provided in Art. 31 (2) not only for "acquisition" but also for "requisition"⁶⁷. In the Government of India Act, 1935, Sec. 299 clause (5) stated, "In this section 'land' includes immovable property of every kind and any rights in or over such property and 'undertaking' includes part of an 'undertaking'". Though this explanation is absent in Art. 31 the present law as derived from judicial interpretations point to the same direction, namely that "property" is (1) only a bundle of rights in regard to property which may be tangible or intangible, (2) or the property itself.

In *Chiranjit Lal's case*⁶⁸ "property" was defined for purposes of Arts. 19 (1) and 31 as that "which by itself can be acquired, disposed of or taken possession of and that the rights to vote for election of directors, the right to pass resolutions and the right to present a petition for winding up are personal rights flowing from the ownership of the share and cannot by themselves and apart from the share be acquired or disposed of, or taken possession of as contemplated by those articles". In the Punjab High Court, Harnam Singh, J., observed⁶⁹, "Property means proprietary rights *in rem*". Hence the benefit of a contract could not be property. So directors and managing agents who manage the company under the terms of a contract cannot be said to be dispossessed of property under the impugned legislation if some one else is asked to take up the management. A mere right to collect revenue or manage a Jagir is not property⁷⁰. In *State of Bihar v. Sri Kameshwar Singh*⁷¹ it has been held that a law made under Entry 36 of List II can authorize acquisition of choses in action like arrears of rent due from tenants which are covered by the term "property" used in that Entry and in Art. 31⁷². Therefore, Sec. 4 (b) of the Bihar Land Reforms Act, 1950, which provides that all arrears of rent, royalties and cesses due for any period prior to the date of the vesting of the Estates in Government shall vest and be recoverable by the State was held *intra vires*.

In the second Sholapur case *Dwarakadas Shrinivas v. Sholapur Spinning and Weaving Coy.*,⁷² per Das, J., "A contract or agreement which a person may have with the company is property within the meaning of Arts. 19 and 31. Bose, J., put it, "Property includes 'any interest in any commercial or industrial undertaking'." Per Ghulam Hassain, J., "The word 'property' used in the article must be construed in the widest sense as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights. The word 'property' is not defined in the Constitution and it is no good reason to restrict its meaning".

It may be noted in the U. S. A. Constitution clause 10 Sec. 1 provides the "contract clause" whereby the right of contract is guaranteed. In India,

65. *Syme v. Commonwealth*. (1942) 66 C.L.R. 413.

66. *Mackertich v. Gupta*, (1945) 49 C.W.N. 322. *Lahore Electric Supply Co. v. Punjab*, (1943) 24 Lah. 617.

67. Vide Entry 42 of List III.

68. *Chiranjit Lal v. Union of India*, A.I.R. 1951 S.C. 44.

69. *Jupiter General Insurance Co. v. Rajajopalan*, A.I.R. 1952 Punj. 9.

70. *Manohar Singh v. State of Rajasthan*, A.I.R. 1953 Raj. 22.

71. (1952) S.C.R. 889.

72. A.I.R. 1954 S.C. 119: 1954 S.C.J. 175. *Mahbub Begum v. Hyderabad*, A.I.R. 1951 Hyd. 1.

there is no such provision. But after the definition of 'contract' as property in the second Sholapur case⁷² the sanctity of contract is sufficiently protected in our Constitution. The older decisions to the contrary are not of any significance.

A decree is property⁷³, as also space above ground (air space enabling trespass by aeroplanes)⁷⁴ and previous grants by state⁷⁵. These could be compulsorily acquired. A water supply system⁷⁶ can also be acquired under the power of *Eminent Domain*.

"Public purpose".

The existence of a "public purpose" is a paramount factor in the matter of acquisition or requisitioning. But the language of Art. 31 (2) does not expressly make it a condition precedent to acquisition. It appears to assume that compulsory acquisition can be for a 'public purpose' only⁷⁷. It may be noted that in the Land Acquisition Act of 1894, a declaration by the Government that land is needed for a public purpose shall be conclusive evidence that the land is so needed, and courts cannot go into the question whether the public purpose has been made out or not⁷⁸. Article 31 is substantially based on Sec. 299 (2) of the Government of India Act of 1935 which latter section was designed to give effect to the recommendations of the Joint Parliamentary Committee. Para. 369 of this report postulated that two conditions should be imposed on expropriation of private property. "Legislation expropriating or authorising the expropriation of the property of private individuals should be lawful only if confined to expropriation for public purpose and if compensation is determined either in the first instance or in appeal by some independent authority". Patanjali Sastri, C.J., therefore opined⁷⁹, "It is, therefore, clear that Sec. 299 (2) was intended to secure the fulfilment of two conditions subject to which alone legislation authorizing expropriating of private property would be lawful, and it seems reasonable to conclude that Article 31 (2) was also intended to impose the same conditions on legislation expropriating private property Indeed, if this were not so there would be nothing in the Constitution to prevent acquisition for a non-public or private purpose, and without payment of compensation—an absurd result. It cannot be supposed that the framers of the Constitution while expressly enacting one of the two well-established restrictions on the exercise of the right of *Eminent Domain*, left the other to be imported from the common law. Art. 31 (2) must, therefore, be taken to provide for both the limitations in express terms".

But the term "public purpose" is not of easy definition. It cannot be stated in precise terms nor has it a rigid meaning. Das, J.,⁸⁰ put it, "Whatever furthers the general interests of the community as opposed to the particular interest of the individual must be regarded as a public purpose. In the never-ending race the law must keep pace with the realities of the social and political evolution of the country as reflected in the Constitution. If, therefore, the state is to give effect to these avowed purposes of our Constitution, we must regard as public purpose all that will be calculated to promote the welfare of

73. *Eastern Railroad Co. v. Boston and Marine Railroad* (1872) 15 Amer. Rep. 13.

74. *United States v. Causeby*, (1946) 328 U.S. 256; 90 Law Ed. 1206.

75. *Long Island Water Supply Co., Brooklyn*, 166 U.S. 685, 41 Law

Ed. 1165.

76. *State of Bihar v. Sri Kameshwar Singh*, 1952 S.C.R. 869.

77. *Ibid.*, per Chandrasekhar Ayyar, J.

78. *Ibid.*

79. *Ibid.*

80. L.R. 42 I.A. 44.

the people as envisaged in the Directive Principles (Arts. 38 to 49) of State Policy, whatever else that expression may mean".

There is an elasticity in the word "public purpose". It takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs. As stated by the Privy Council in *Hambai Framjee Petil v. Secretary of State for India*⁸¹, "General definitions are I think rather to be avoided wherever the avoidance is possible and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease; it is enough to say that in my opinion the phrase whatever else it may mean, must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals is directly and vitally concerned".

Though the acquisition may be in favour of a private individual or corporation, yet its result may benefit the public at large. Hence it is not necessary that the entire community or even a good portion of it should directly enjoy or participate in the improvement⁸². May be, the individual that is benefited, not as an individual but in furtherance of a scheme of public utility, e.g., scheme of construction of houses in slum areas relieving congestion and introducing more sanitary conditions so as to improve the individual as well as the collective social welfare and prosperity⁸³. Similarly, acquisition under a co-operative scheme for building houses to combat scarcity of living dwellings, overcrowding and rack renting is a public purpose⁸⁴. As stated by Cooley,⁸⁵ "In the very nature of the case, modern conditions and increasing inter-dependence of the different human factors in the progressive complexity of a community make it necessary for the Government to touch upon and limit individual activities at more points than formerly". So the American term "public use" has led to a more liberal interpretation such as "public advantage" or "public benefit". In our Constitution the expression used is "public purpose" which is much wider in scope than "public use". Implementing any of the avowed principles set out in Part IV of the Constitution (Directive Principles) is indeed a public purpose⁸⁶. Entry 42 of the Concurrent List III refers to "purposes of the Union or of a State" or for "any other public purpose". In the State List II Entry 36 reference is to acquisition or requisitioning of property except for the purposes of the Union and subject to Entry 42 of List III. But in the Union List I Entry 33 it merely mentions "acquisition or requisitioning of property for purpose of the Union". Thus it would appear that in the Concurrent and the State field the power to acquire or requisition is wider in scope. A State can acquire or requisition for a public purpose on a subject which is not in the Union List.

The English authorities that consider "public purposes" in relation to "charities" may not be wholly applicable to India. But in that context it will not be inappropriate to consider purposes like promotion of industry, art, commerce, etc.⁸⁷.

81. *Thambiran v. State of Madras* (1952) 7 D.L.R. 275 Mad.

82. *Mahammed v. The State*, A.I.R. 1952 T. C. 522.

83. *Thambiran v. State of Madras*, (1952) 7 D.L.R. 275 (Mad.).

84. 'Constitutional Limitations', Vol. II PP 1139-40.

85. *Suryapal Singh v. U. P. Government*, A.I.R. 1951 All. 674.

86. *Crystal Palace v. Minister of Planning*, (1950) 2 All. E. R. 857.

87. *Paramanandadas v. Vinayak*, 7 Bom. 19 P.C.

The following have been held to be "public purposes" in India in relation to charitable endowments :— Lodging of Saints⁸⁹, catering newspaper and periodicals to the public for promoting higher educational and liberal outlook⁸⁸, handspinning and Khaddar devoid of political propaganda⁸⁹, instituting educational institutions⁹⁰.

What are public purposes under Art. 31 (2).

The following have been held to be public purposes within the meaning of Art. 31 (2) :—

1. Providing accommodation to a minister of Government⁹¹, or a public officer⁹², as that would otherwise impair the efficiency of public service and all comforts should be given to such gentry.
2. Rehabilitation and settlement of refugees⁹³.
3. Providing accommodation for pilgrims from various parts of India⁹⁴.
4. Ridding away unemployment in a section of the community⁹⁵.
5. Affecting land reforms in Zamindari estate yielding Bhumidari rights to tenants. This distributes land to greater number of needy people and abrogates concentration of it in a few. The monies received from ryots who seek Bhumidari rights also will be used for state purposes and for the benefit of the public at large, e.g., the U. P. Zamindari Abolition and Land Reforms Act 1 of 1951⁹⁶.
6. Land reforms by nationalization of the means of production and elimination of the concentration of the means of production in a few, e.g., the Bihar Land Reforms Act of 1950⁹⁷.
7. To confer Malik Maqbuza status on occupancy tenants and improve their position and to vest management of village affairs and cultivation in a democratic village body⁹⁸. This establishes direct contact between tillers of the soil and the Government abolishing all intermediaries.
8. To require lands for a building society to construct houses for poor people in a slum area⁹⁸. It is a public purpose though the immediate beneficiaries may be the members of the society.
9. Settlement of immigrants and acquisition of lands therefor, e.g., the West Bengal Development and Planning Act, 1948 (XXI of 48)⁹⁹.
10. Abolition of Jagirs with a view to benefiting the community at large

88. *Tribune Press v. Commissioners of I.T.*, (1939) 43 C.W.N. 1065 P.C.

89. *All India Spinners Assn. v. Commissioner of I.T.*, (1944) 49 C.W.N. 1 P.C.

90. *Haridasi v. Secy. of State*, 7 Cal. 304 P.C. *Kayastha Pathasala v. Baghwali*, (1937) All. 3 P.C.

91. *Sudhindra v. Sailendra*, (1950) 87 C.L.J. 140.

92. *Manohar v. Desai*, A.I.R. 1951 Nag. 33.

93. *Safi v. State of West Bengal*,

(1951) 55 C.W.N. 463.

94. *Amulya v. Corporation of Calcutta* (1922) 27 C.W.N. 125 (P.C.).

95. *Dwarakdass v. Sholapur Spinning Co.*, I.L.R. (1957) Bom. 473.

96. *State of Bihar v. Kameshwar*, A.I.R. 1952 S.C. 232 (311-27).

97. *Visheshwar v. State of M.P.*, (1953) 8 D.L.R. 14 (S.C.).

98. *Thambiran v. State of Madras*, A.I.R. 1952 Mad. 756.

99. *Aswin Kumar v. State of West Bengal*, A.I.R. 1952 Cal. 679.

by eliminating intermediaries enabling direct contact of the Ryot with the Government¹⁰⁰.

11. Acquisition of house sites for providing poor panchama labourers who are homeless or who have no permanent dwelling houses¹.
12. The preamble in an Act may be taken into consideration in determining whether the Act is or is not for a public purpose². A provision in a statute that the determination or declaration by the executive shall be conclusive evidence that the land was required for a public purpose cannot bar the jurisdiction of the court to go into the question³.
13. Where for the proper conduct of services in a Devaswom temple it is necessary to secure for the high priest of the temple undisturbed possession of the property which he used to enjoy from time immemorial, it is a purpose in which the Devaswom is interested and in that sense a public purpose⁴.
14. The object of Sec. 9 of the Evacuee Interest Separation Act (1951) is to extinguish usufructuary mortgages of evacuee agricultural land which had been in existence over twenty or more years so that evacuee interest can be separated completely and to benefit displaced persons who form a good bulk of the community. This is a public purpose⁵.
15. The possession of properties of strangers or non-evacuees which the Custodian takes over under Sec. 10, Administration of Evacuee Property Act, is not outright possession nor does it destroy their ownership but it is incidental for purposes of administration of the evacuee property which are jointly intertwined with non-evacuee property. The section is *intra vires* though it has nothing to do with the compulsory acquisition for public purpose outlined in Art. 31⁶.
16. The public purpose need not be specifically stated in the statute. It is enough if it is apparent from an overall reading of the Act⁷.

What are not public purposes.

The following were held to be not for public purpose :—

1. Requisitioning of house for allotment to the first informant of the supposed vacancy of the house⁸.
 2. Requisitioning property of one refugee for the benefit of another refugee⁹.
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| <p>100. <i>Maloji Rao v. State of Madhya Bharat</i>, A.I.R. 1951 M.B. 97.</p> <p>1. <i>Ramasamy Ayyar v. Secretary of State</i>, A.I.R. 1931 Mad. 361. See also <i>Veera Raghavacharia v. Sec. of State</i>, A.I.R. 1925 Mad. 837. <i>Secretary of State v. Gopalayyar</i> A.I.R. 1930 Mad. 798.</p> <p>2. <i>Ramdas v. State of U.P.</i>, (1952) 7 D.L.R. 267.</p> <p>3. <i>Mahammed v. State</i>, A.I.R. 1952 T.C. 522.</p> | <p>4. <i>Neelakanta Ayyar v. T. C. State</i>, A.I.R. 1955 T.C. 46.</p> <p>5. <i>Sampuran Singh v. Competent Officer</i>, A.I.R. 1955 Pepsu 148.</p> <p>6. <i>Mohd. Fazlur Rahman v. Custodian, Evacuee Property</i>, A.I.R. 1956 Hyd. 91.</p> <p>7. <i>Kandan Lekha v. State of Punjab</i>, A.I.R. 1956, Punj. 92.</p> <p>8. <i>Bhanjee v. State of Bombay</i>, (1952) 54 Bom. L.R. 893.</p> <p>9. <i>Prov. of Bombay v. Khusaldoss</i>, 1950 S.C.R. 621.</p> |
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3. To acquire Zamindari estate along with all arrears of rent just to enable Government to pay compensation to the Zamindars. The raising of revenue to pay compensation renders the legislation colourable and void¹⁰, e.g., Sec. 4 (b) of the U. P. Zamindari Abolition and Land Reforms Act of 1 of 1951¹¹.
4. To compute compensation by deducting from the gross asset of the estate, the costs of works for the benefit to Raiyats at 4 to 12 per centum rates according to the amount of the gross asset—this is confiscatory in character. For this makes the calculation of the cost of the works at a flat rate without reference to actual expenses which reduces the net income which only will be the basis of assessment of compensation, e.g., Sec. 23 (f) of Act 1 of 1951, U. P.
5. The Bihar State Management of Estates and Tenures Act, 1949, was held void as it disclosed no public purpose in so far as it did not benefit either the state pecuniarily or the tenant. It was mere Governmental management expropriating the landlord¹².
6. If an acquisition is proved to have been made not for a public purpose but with an ulterior object extraneous to the scope of the Act it is *ultra vires*¹³.
7. After acquisition, a diversion of the property to some purpose other than that originally contemplated, is not permissible¹⁴, as that cannot be the "public purpose" so declared at the time of acquisition.
8. When the statute does not state that the property is being taken for a public purpose there is no presumption of constitutionality at all¹⁵.
9. Raising funds for the treasury is not a public purpose¹⁶. As Cooley says¹⁷, "The principle of compulsory acquisition of property is founded on the superior claims of the whole community over an individual citizen but is applicable only in those cases where private property is wanted for public use or demanded by the public welfare and that no instance is known in which it has been taken for the mere purpose of raising a revenue by sale or otherwise and the exercise of such a power is utterly destructive of individual right. Taking money under the right of *Eminent Domain* when it must be compensated in money afterwards is nothing more or less than a forced loan".

"Public purpose" if justiciable.

The question arises if the declaration of "public purpose" by the Government is subjective or objective? Is it an administrative act pure and simple and not therefore justiciable? One thing is certain the legislatures are governed by the powers vouchsafed to them under the various Lists I, II and III of

10. *State of Bihar v. Kameshwar*, A.I.R. 1952 S.C. 252 (274).

11. *Ibid.* (pp. 270, 275 & 276).

12. *Kameshwar v. Prov. of Bihar*, A.I.R. 1950 Pat. 392 (429).

13. *Manick Chand Mahata v. Corporation of Calcutta*, I.L.R. 48 Cal. 916.

14. See *Luchmeshwar v. Darbanga*

Municipality, I.L.R. 18 Cal. 99 (P.C.).

15. *Kameshwar v. State of Bihar*, A.I.R. 1951 Pat. 91 (95).

16. *State of Bihar v. Kameshwar Singh*, A.I.R. 1952 S.C. 252.

17. Vol. II, p. 13, 'Constitutional Limitations' quotation 1952 S.C. 252.

Schedule VII. So it is perfectly open to the court to insist that there is legislative competence in the first instance. Thus in *W. B. S. Co-op. Credit Society v. Mrs. Bella Bannerjee*¹⁸ it was held that court can scrutinize if the impugned legislation is within legislative competence. The effect of Art. 31 (2) read with item 33 of List I, item 36 of List II and item 42 of List III shows that neither the central legislature nor the State legislature have any power to legislate in respect of compulsory acquisition for private purposes. Also the state cannot legislate for a Union purpose and *vice versa*.

The point is to be clearly borne in mind that the existence of a public purpose is clearly essential condition for the acquisition of property under Art. 31 (2). So if there is no public purpose involved the statute is null and void¹⁹.

In this connection Patanjali Sastri, C.J.'s view in *State of Bihar v. Sri Kameshwar Singh*¹⁹ that the existence of a public purpose is a condition precedent to the exercise of compulsory acquisition is very elucidative. The views of Mahajan and Chandrasekhara Ayyar, JJ., to the effect that it is not a condition precedent is based on the absence of clear words to that effect in Art. 31 (2). In *Maloji Rao v. State of M. B.*²⁰ the full Bench agreed with the view of Patanjali Sastri, C.J. The same is the view at any rate of the Calcutta High Court in two cases²¹. Therefore, it is safe to accept Patanjali Sastri's view that the existence of a public purpose is a condition precedent and this being in the fundamental rights chapter is certainly justiciable.

The decision in *Prov. of Bombay v. Kusaldoss*²² gave all the trouble. For the majority of the judges construed the language of the impugned statute "if in the opinion of the provincial government" to mean that the matter was one for the subjective consideration of the Government and was purely an administrative Act, not capable of being justiciable unless *mala fides* or bad faith was raised. But Mahajan and Mukerjee, JJ., in that case opined that the question of "public purpose" was an objective one and the executive declaration was not final but was subject to the scrutiny of the court. But in this case no question of the legislative power came into direct question. It was a case of legislature empowering the executive to determine the question. Hence their Lordships held no writ of *certiorari* lay. The Patna High Court held that the question of "public purpose" was justiciable²³.

But in *Chiranjit Lal v. Union of India*²⁴ Mukherjee, J., had clearly observed "Art. 31 (2) prescribes a two-fold limit within which such superior right of the State should be exercised. One limitation is that such taking away must be for a public purpose. The other provision is payment of compensation in the manner laid down in the clause". Taking this clear exposition along with the interpretation of Patanjali Sastri, J., in *Kameshwar Singh's* case, "public purpose" is a necessary condition precedent and is, therefore, justiciable. Mukherjee and Das, JJ., also were of the opinion that two-fold limit spoken

18. A.I.R. 1952 Cal. 554.

19. *State of Bihar v. Kameshwar*, A.I.R. 1952 S.C. 252 (273, 275 and 279, 288 and 295): 1952 S.C.R. 889.

20. A.I.R. 1953 M.B. 97.

21. *Abdul Hamid v. State of West Bengal*, A.I.R. 1953 Cal. 225. *W. B. S. K. Co-operative Society Ltd. v. Beke Banerjee*,

A.I.R. 1952 Cal. 554. Contrary view *Mohd. Safi v. State of West Bengal*, A.I.R. 1951 Cal. 97.

22. 1950 S.C.R. 621.

23. *Kameshwar v. Prov. of Bihar*, A.I.R. 1950 Pat. 392. *Kameshwar v. State of Bihar*, 1951 Fat. 91 S.B.

24. A.I.R. 1951 S.C. 41.

of in Charanjit Lal's case is a limit prescribed by Article 31 (2). "What is implied in the clause must nevertheless be a provision of the clause for the word 'provision' is certainly wide enough to include an implied as well as an express provision. . . . The requirement of a public purpose is an essential prerequisite of compulsory acquisition. It is, if anything, essentially a provision of that clause and an integral part of it".

Though the legislature is not the absolute or ultimate judge of what is a "public purpose" the legislature may be deemed to have given its responsible opinion on the public nature of the purpose. Courts must, therefore, give due weight to such opinion²⁵. Legislative declaration of a public purpose must be respected²⁶. Any such statute must be looked as a whole and the purpose behind the scheme as a whole must be scanned. It is no good merely picking out particular items and say that they are not supported by any public purpose²⁷. No express terms are needed in a statute to denote the public purpose. It is enough if the whole tenor of the legislation is for purposes of the state or for purposes of the public²⁸. As the public purpose is clearly justiciable any provision that leaves the matter to be conclusively determined by the executive, will not debar courts from examining the whole matter²⁹. It is but proper if the order of acquisition or requisition should contain a clear declaration regarding the specific purpose for which the property is needed³⁰⁻⁴⁰.

The Land Acquisition Act, 1894, has a provision in Sec. 6 that a declaration by the Government as to the public purpose shall be conclusive evidence in the matter. Even now under Art. 31 Cl. (5) (a) in respect of existing laws, courts will not be able to enquire into the question of public purpose³¹.

In *M. B. Namazi v. Deputy Commissioner of Evacuee Property*³² Rajamannar, J., took the view that mere state policy or policy of the party in power would not amount to "public purpose" within the meaning of Art. 31 (2). The Allahabad High Court³³ has held that the term can be taken to mean some directive principle of State policy. This is so since the Directive Principles in Part IV of the Constitution, lays down the public programme for our state to bring about social, economic and cultural welfare of the people of our Republic. Maintenance of public convenience, sanitation and health is public purpose³⁴. The American older viewpoint³⁵ that there must be use by the public to constitute a public purpose has never been the law in India. The latter American view that the thing taken must be useful to the public has been accepted in Article 31. (2).

The doctrine of *Eminent Domain* or the Sovereign's right to appropriate private property for public use may be said to have devolved on the legislature when the Constitution lays down the legislative prerogative of acquisition and also the limitations thereto. As we have already stated, a law made for the purpose of securing an aim declared in the Constitution to be a matter of

25. *Thambiran v. State of Madras*. (1952) 7 D.L.R. 275.

26. *State of Bihar v. Kameshwar* A.I.R. 1952 S.C. 252.

27. *Ibid*, p. 291 Das, J.

28. *Ibid*, p. 274 Mahajan, J.

29. *Muhammad v. State*, A.I.R. 1952 T.C. 522.

30. *State of Bombay v. Mohan Lal*, A.I.R. 1951 Bom. 404, *Jewan Ram v. State of Rajasthan*,

A.I.R. 1952 Raj. 137.

31. *C. Rajendra v. Govt. of West Bengal*, (1951) 56 C.W.N. 156.

32. A.I.R. 1951 Mad. 930.

33. *Suryapal Singh v. U.P. Government*, A.I.R. 1951 All. 614.

34. *Muhammad Saff v. State of West Bengal* A.I.R. 1951 Cal. 97.

35. See Willis: 'Constitutional Law', p. 817, 818.

state policy (Directive Principles) is indeed for a public purpose. It is no argument to negative this on the ground that the statute is after all an experimental measure, and possibly no act may result in no benefit to the public or it may as well ruin a large section of the public. We may quote in this connection the observations of Frankfurter, J.,³⁶ "Even where the social undesirability of a law may be conveniently urged, invalidation of the law by a court debilitates popular government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good but it may prove innocuous. Even if a law is found wanting on trial it is better that its defects should be demonstrated and remedied than that the law should be aborted by judicial fiat".

In this view the legislative declaration of a "public purpose" cannot be challenged in a court of law. But if the legislature departs from the Directive Principles of State Policy as adumbrated in Part IV of the Constitution, and an arbitrary "purpose" is declared, certainly as stated by Patanjali Sastri, J., in *Kameshwar Singh's case*³⁷ it is justiciable. "Public purpose" being a condition precedent for acquisition per Art. 31 (2), it acquires the character of a fundamental right and is, therefore, justiciable. The legislature is, therefore, not the ultimate authority of what is a public purpose. But nevertheless a legislative declaration on that matter must be given its due weight in the ultimate analysis of the court. If the legislature departs from the limitations imposed on it by declaring a non-public purpose as a public purpose, certainly it cannot stand the test of judicial scrutiny. If the legislature took its definition of a public purpose as what is all contained in the Directive Principles of State Policy (Part IV of the Constitution) it is quite within safe grounds.

The courts, therefore, have jurisdiction not only to adjudicate on the question whether a purpose is a public purpose but also to see if it is within the legislative competence of the legislature. The Supreme Court in *Prov. of Bombay v. Khusaldas*³⁸ felt that the language of the statute impugned indicated that the nature of the entire act of requisition including the determination of the nature of the purpose was subjective administrative act and not justiciable. Mahajan and Mukherjee, JJ., gave the minority opinion that it was "objective" and "justiciable". But it may be noted this was a case where the legislature had empowered the executive to determine the question and the court was not called upon to decide any legislative declaration of a "public purpose". But as we have already pointed out, legislative declarations of a public purpose are no doubt entitled to respect. But the courts are not fastened to that but can certainly see if such a public purpose is a "real" and "reasonable one". In *Kameshwar v. State of Bihar*³⁹ Reuben and Dass, JJ., quote with approval Weaver to the following effect: "What constitutes a public use is largely for the legislature and the courts will not interfere except to inquire whether the legislature could reasonably have considered the use a public one. Generally, the phrase is not limited to business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. It may include not only the present demands of the public, but also those which may be fairly anticipated in the future.

36. *American Federation of Labour v. American Cash and Door Co.*, 333 U.S. 538-93 Law Ed. 222 (230).

37. *State of Bihar v. Kameshwar*, A.I.R. 1952 S.C. 252.

38. (1950) S.C.R. 621.

39. A.I.R. 1951 Pat. 91 S.E.

It must be one in which the public actually has interest, and the terms and manners of enjoyment must be within the control of the state".

The question that has to be posed in all cases of legislation affecting acquisition of property is, "Could the legislature reasonably have considered the purpose to be a public purpose?⁴⁰ The propriety of legislative decision is not relevant, only the reasonableness of it⁴⁰.

Compensation.

This is a very salutary provision in Art. 31 (2) providing compensation in all cases of acquisition or requisitioning of property. The state is obliged to pay compensation in all such cases. This is indeed a necessary incident of the power of compulsory acquisition as emphasised by the English Common Law, and the continental doctrine of *Eminent Domain* which was later adopted in the U. S. A. By the incorporation of this provision for compensation directly in Art. 31 (2) the citizen gets a specific fundamental right in the same⁴¹. He can thus challenge any law which does not make such a provision for compensation in cases of acquisition of property.

Providing for compensation.

Sec. 299 of the Government of India Act, 1935, laid down two conditions that any law providing for acquisition of property must (a) either fix the amount of compensation, or (b) specify the principles on which the compensation is to be determined. Art. 32 of the Constitution of India is mainly based on Sec. 299 of the 1935 Act. But in Sec. 299 the words used are "for the payment of". These are omitted in Art. 31 (2). This indicates that payment under Art. 31 (2) need not be in the shape of money but may also be in bonds, or in kind such as land. This provision is necessary to meet situations arising for the state to pay very huge sums when it acquires big areas such as Zamindaris⁴². It will be noted that the American and Australian provision for payment of "just" compensation is omitted here. In those countries what is "just compensation" is justiciable and is not left to the sweet will of the legislature or the executive⁴³.

Entry 32 of List I empowers Parliament to enact laws for "acquisition or requisitioning of property for purposes of the Union". Entry 36 of List II makes a corresponding provision for State purposes and adds that it shall not encroach on the "purposes of the Union" and should be subject to the provision of Entry 42 of List III. The latter entry postulates, "Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined and the form and manner in which such compensation is to be given".

Thus Entries 32 (List I) and 36 (List II) are mere heads of legislative items while Entry 42 of List III empowers both the Centre as well as State to enunciate in the statutes they enact the principles on which compensation is to be based. Entries 32 and 36 are silent regarding compensation since Art. 32 itself provides for it and the legislative entry is separate in Entry 42. The implication of the words "subject to the provisions of Entry 42 in List III" occurring in Entry 36 List II in the words of Patanjali Sastri, J.,⁴¹ "mean

40. 'Constitutional Law', p. 546.

41. Mahajan, J., in *State of Bihar v. Kameshwar Singh*. (1952) S.C.R. 889.

42. *Kameshwar v. State of Bihar*,

A.I.R. 1950 Pat. 392.

43. See *Sea Board Air Line Co. v. U.S.*, (1923) 261 U.S. 239. *Australian Marketing Board v. Tonking* (1942) 66 C.L.R. 77.

no more than that any law made under Entry 36 by a State legislature can be displaced or over-ridden by the Union legislature making a law under Entry 42 of List III. The only purpose of the words 'subject to' occurring in Entry 36 is to indicate that legislation under Entry 36 would be subject to any law made by Parliament in exercise of its legislative power under Entry 42 of the Concurrent List. But the legislature can legislate under Entry 42 but the parliamentary statute made in exercise of powers under this entry would have preference over a state law in case of repugnancy and it was for this reason that reference was made to Entry 42 in the head of legislation mentioned in the State List under Entry 36".

Das, J., in the same case posited that the scheme of our Constitution was three-fold.

1. The power of making a law for acquisition of property in Article 246 read with Entry 36 in List I and Entry 36 in List II.
2. The obligation of such law to provide for compensation in Art. 31 (2).
3. And the power of making a law laying down the principles for determining such compensation in Art. 246 read with Entry 42 in List III.

The above scheme connotes that Entry 33 in List I and Entry 36 in List II are mere heads of legislative power and there is absolutely no need to treat the obligation to pay compensation as implicit in or as part and parcel of these legislative heads themselves, for it is separately and expressly provided for in Art. 31 (2).

Specifying the principle of 'compensation'.

In all acquisitions of property Art. 31 (2) enjoins in a mandatory manner that the law in question shall provide for—

1. compensation for the property taken possession of or acquired and
2. (a) either fix the amount of compensation, or
(b) specify the principles on which and the manner in which the compensation is to be determined and given.

The term "specify" connotes that the legislature must itself either fix the compensation to be paid or specifically specify the principle on which such compensation has to be calculated and paid.

While it is permissible for the legislature to generally empower subordinate bodies to acquire property it cannot delegate its special legislative responsibility in demarcating the principles on which any compensation for such acquisition can be calculated and paid. Such a delegation to any other body or the executive is not within legislative competence. Entry 42 of List III is a specific legislative entry to enunciate the principles on which compensation is to be determined, the form and the manner in which such compensation is to be given.

In the latest Supreme Court decision, *Raja of Ettyapuram and thirteen others against Madras and Andhra States*⁴⁴, the principles enunciated in *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh*⁴⁵ could not be applied as

44. *Vide 'Hindu'* 7 Feb. 1954: 1954 S.C.J. 282.

45. 1952 S.C.R. 889: A.I.R. 1952 S.C. 282.

the Bihar Land Reforms Act which was impugned in the latter case was protected under Art. 31 (4) and so was not justiciable. But even in that Act Secs. 4 (B) and 23 (A) of the Act were held void as they did not come within Entry 42 of List III under which they were purported to have been enacted. It was contended in the instant case⁴⁴ which arose under a statute within the purview of the Government of India Act, 1935, namely, the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, that the provisions were colourable legislative provisions which had been enacted in fraud of the 1935 Act. But as the only entry—Entry 9 of List II—of the latter Act referred to “compulsory acquisition of land” only and there was no provision for compensation, the only umbrage could be under Sec. 299 (2) of the 1935 constitution but sadly enough Art. 31 (b) of the Constitution prevented the particular statute (the Madras Act XXVI of 1948) from being justiciable on the issue of want of provision for compensation. The appeals were, however, dismissed without costs. It may be stated that there appears to be no special rational justifying ground for a provision like Art. 31 (b). It appears to smack of certain discrimination that Acts attracted to Arts. 31 (4) and 31 (6) should be free from the obligation created under Art. 31 (2) and even Sec. 299 (2) of the 1935 Act.

Justice Mukherjee stated in the instant case⁴⁵ vis-a-vis Entry 42 of List III that “it was undoubtedly the description of a legislative head and in deciding the competency of a legislation under this entry, the court was not concerned with the justice or propriety of the principle upon which the determination of the compensation was to be made or the form or manner in which it was to be given. But even then the legislation must rest upon some principle of giving compensation and not of denying it or withholding it and a legislation could not be supported which was based upon something which was non-existent or was unrelated to facts and consequently could not have a conceivable bearing on any principle of compensation”.

The position, therefore, may appear to reduce itself to this, that a statute that rests on some principle of compensation cannot be impugned. May be the principle may not lead to a grant of what is called “just” compensation. But a statute that wholly denies compensation is of course void.

There are certain guiding principles in the matter of fixing compensation. The market value of the property is the normal measure of compensation⁴⁶. The value of the property may be assessed as on the date of acquisition⁴⁷. The locality and the utility of the land is another factor.

If a person has on account of the afflux of time acquired title by adverse possession to a property which was at one time a public property that property cannot be taken by the State, even according to the Continental doctrine of *Eminent Domain* subsequently adopted in America, without payment of compensation⁴⁸.

Since the decision of the Privy Council in *Attorney General v. De Keyser's Royal Hotel*⁴⁹ it is well recognised that compensation has to be paid even for acquisition for administrative purposes during war emergency (World War II)⁵⁰.

46. *United States v. Couby*.
(1946) 328 U.S. 256 : 90 Law
Ed. 1206.

47. *United States v. Miller* (1943)
317 U.S. 369.

48. *Brij Bhukan Kalwar v. S.D.O.*

Siwan & others, A.I.R. 1955
Pat. 1.

49. 1920 A.C. 506 at 576.

50. *Atoichow Singh v. Chief Commissioner, Manipur*, A.I.R.
1956 Mani. 4.

For Art. 31 (2) or S. 299 Government of India Act, 1935, to be attracted, the right in land or property, namely incorporeal rights should possess all the attributes of property. This means that the ownership must be full including all the totality of rights, the owner being entitled to have all the conceivable uses of it⁵¹.

'Justness', 'Reasonableness' and Amount of Compensation.

The term "compensation" means "equivalent"⁵². "To compensate" means only "to balance"⁵³. In *Fraser v. City of Fraser Ville*⁵⁴ the measure of compensation was posited to be "the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities but excluding any advantages due to the carrying out of the scheme for which the property is compulsorily acquired".

As stated in *Raman Das v. State of U. P.*⁵⁴, "compensation" does mean "just and reasonable compensation or a just equivalent for the property taken". This is on the score that one cannot visualize an "unjust" compensation as any compensation. As has already been observed, in America and Australia their constitutions do provide for a just compensation and the "justness" is justiciable and is not left arbitrarily to the legislature or the executive⁵⁵.

The word "just" is absent in Art. 31 (2). But that does not whittle down the position. As has been held in *Kameshwar v. State of Bihar*⁵⁶, the absence of the word "just" or "fair" from Art. 31 (2) does not make the subject of the amount of compensation non-justiciable. Compensation, as already stated, is a constitutional guarantee under Part III of the Constitution and therefore certainly justiciable. The term "compensation" does connote that the person deprived must be given some "equivalent" in value. "If the adjective 'just' had been omitted and the provision was simply that property should be taken with compensation the natural import of the language would be that the compensation should be the equivalent of the property. All this is made emphatic by the adjective 'just' "⁵⁷. It is apposite also to refer to Nichols⁵⁸ on 'Eminent Domain' where he states, "The adjective 'just' only emphasises what would be true if omitted—namely, that the compensation should be the equivalent of the property. It has been said in this regard that it is difficult to imagine an 'unjust compensation' " Harries, J., remarked similarly⁵⁹, "Nothing can be compensation which is unjust or unreasonable, because if it is not a proper equivalent then it is not compensation and anything which is unjust or unreasonable can never be regarded as an equivalent".

So compensation in effect means payment in equivalent, which need not necessarily be in money form⁶⁰. So the legislative direction in Art. 31 (2) that

51. *Girijananda v. State of Assam* A.I.R. 1956 Assam 33, following A.I.R. 1951 S.C. 41, A.I.R. 1954 S.C. 282 and A.I.R. 1951 Bom. 86.

52. See Murray's Oxford Dictionary.

53. (1917) D.C. 187.

54. (1952) 7 D.L.R. All. 12.

55. *Sea Board Air Line Co. v. U.S.* (1923) U.S. 299. *Australian Marketing Board v. Tonking*, (1942) 66 C.L.R. 77.

56. A.I.R. 1951 Pat. 91.

57. Per Brewer, J., in *Monongahela Navigation Co. v. U.S.*, (1893) 37 Law Ed. 463; quoted by Reuben, J., in *Kameshwar v. State of Bihar*, A.I.R. 1951 Pat. 91.

58. Vol. III, p. 29. Referred also by Reuben, J., *ibid.*

59. *W.B. S.K. Co-operative Society v. Bella*, A.I.R. 1951 Cal. 111.

60. *Surya Pal v. Govt. of U.P.*, A.I.R. 1951 All. 674.

principle of compensation may be set down prohibits laying down of any principle which would result in non-payment of compensation or not paying any compensation whatsoever⁶¹. The principle is compensation and not confiscation⁶¹. Yet again, if compensation is purposely made negligible as a mere cloak for confiscatory legislation, it is unconstitutional. The decisions of the Patna⁶¹ and Calcutta High Courts⁶² have clearly pointed out that the amount of compensation is justiciable. This is but proper and the seeming view that the legislature is the authority in the matter of compensation subject to judicial scrutiny only in the case of attempted fraud on the Constitution is not correct. The courts can go fully into the reality and amount of compensation. If the market price of the land is the criterion is it to be the one at the time of acquisition or at the time of payment? The value is to be judged from the view of the expropriated person and not the purchaser. "The owner is only to receive compensation upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses."⁶³.

In *Gobinda v. Dinesh*⁶⁴ it was pointed out that in a Regime of Price Control, just compensation did not require payment of the market price. In the words of Bose⁶⁵, "There can be no doubt that the economic conditions prevailing in the country and the food situation of the country require that ceiling prices fixed by the Government should be treated or accepted as the measure of just compensation. Just compensation cannot mean that the Government must compensate the owner of the paddy for potential profits lost because of economic distress in the country and consequent price control".

While there must be "just compensation" the manner and time of payment is, however, left to the legislature. This has to be so to enable the state to cope with acquisitions which may be necessitated on a mass scale. The state finances have to be harnessed and harmonized with all situations.

The elaborate provisions for compensation in a statute as the Land Acquisition Act is applicable to only that Act. Lands acquired under other statutes cannot be controlled by the Acquisition Act. As stated in *State of Bihar v. Kameshwar* the doctrine of 'occupied field' cannot be invoked against state legislations providing principles of compensations in other Acts. If the legislature fixes the compensation at a particular figure by law or if the principles enunciated by the law for the determination of the compensation lead to a particular figure, it cannot be said that this figure could be assailed as unfair or inadequate by court of law⁶⁵. The court is bound to give all the weight to the legislative declaration.

There is no compensation against loss or deprivation of property outside the ambit of Art. 31 (2), if the loss is occasioned by the "police power of the state" under Art. 19 (5).

Legislative Entry.

The relevant entries are Entry 32 List I where the acquisition is for the purposes of the Union. If it is for other public purposes it is a State subject

61. *State of Bihar v. Kameshwar*, (1953) 8 D.L.R. 419 S.C.

62. *W.B. Co-operative Society v. Bella*, A.I.R. 1951 Cal. 111 (Appeal lay to the Supreme Court?)

63. Per Fletcher Moulton, J., in

Arbitration between Lucas and Chesterfield Board, (1919) 1 K.B. 16 (28).

64. (1952) 7 D.L.R. 58 (Cal.).

65. See Keer's 'Law of Australian Constitution', p. 199.

attracting Entry 36 List II. Entry 42 List III is the power relating to compensation which is made a concurrent subject. The property acquired by the State shall vest in the State while that acquired by the Union shall vest in the Union [*vide* Art. 292 (2)].

The legislature can possibly adopt the ingenious device of first passing an Act which provides for compensation in cases of compulsory acquisition and subsequently amending it so as to nullify the provision. This appears to be possible within the ambit of Art. 31 as it stands now⁶⁶.

Judicial Interpretation (Art 31 (2)).

In *Manohar Ramakrishna v. G. G. Desai*⁶⁷ it has been held that a Government officer is charged with the performance of public duties and such a person should be properly housed to enable him to discharge his duties. The requisitioning of accommodation for him is as much a public purpose as is the location of a public office. In *Nataraja v. Madras State*⁶⁸ the same principle was upheld on the ground that otherwise the interest of the Government and that of the public would necessarily suffer if their officers were not properly housed. In the *Abdul Hamid v. State of West Bengal*⁶⁹ the requisition for employees of State Government whether refugee or otherwise was held to be public purpose. As stated earlier acquisition of land for slum clearance, construction or houses and development schemes have been held to be public purposes⁷⁰. Acquisition of Zamindari with a view to removing the intermediaries between the ryot and the State has been held to be a public purpose⁷¹. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (M. P. Act 1 of 1951)⁷² and the (U. P. Act 1 of 1951)⁷³ were held to be public purposes. Mahajan, J., stated in the last case, ".....In my opinion, legislation which aims at elevating the status of tenants by conferring upon them Bhumidari rights, to which status the big Zamindaris have also been levelled down cannot be said to be wanting in public purposes in a democratic state. All that the Act achieves is the equality of the status of the different persons holding lands in the State. The moneys received from persons seeking Bhumidari status or from the income of Zamindari estates will be used for State purposes and for the community at large". The same judge has further held that even Crown grants and property dedicated to charity by a private individual, can be acquired for a public purpose under the sovereign power of acquisition.

The Supreme Court has held in *State of Bihar v. Sir Kameshwar Singh*⁷⁴ the following :

1. A law made under Entry 36 of List II can authorize acquisition of choses in action like arrears of rent due from the tenant which are covered by the term "property".

66. *Malik Khizar Hayat Khan Tiwana v. Punjab Province*, A.I.R. 1955 N.U.C. (Pak., Lahore) 5443.

67. A.I.R. 1951 Nag. 33 (C.P. & Berar Accommodation Requisition Act, 63 of 1948).

68. A.I.R. 1953 Mad. 252 [Madras Buildings (Lease and Rent Control) Act of 1949 as amended by Act 8 of 1951].

69. A.I.R. 1953 Cal. 223 [West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947].

70. *Padyachi v. State of Madras*, A.I.R. 1952 Mad. 756 ; *Satyavathy v. State of Madras*, A.I.R. 1952 Mad. 252.

71. *State of Bihar v. Kameshwar Singh*, 1952 S.C.R. 889.

72. *Visveswara Rao v. Madhya Pradesh State*, 1952 S.C.R. 1020.

73. *Raja Surya Pal Singh v. State of U.P.*, 1952 S.C.R. 1056 in appeal from A.I.R. 1951 All. 574.

74. 1952 S.C.J. 354 : A.I.R. 1952 S.C. 253.

2. In the Bihar Land Reforms Act XXX of 1950 payment of compensation is not a justiciable issue having regard to Articles 31 (4), 31A and 31B (*vide* comment under the latter articles). It is not open to the court to inquire into whether a deduction which results in reducing the compensation is unwarranted and therefore a fraud on the Constitution.
3. The manner, time of payment, and the proportion in which compensation should be paid in cash and in bonds, and the instalments of payment could be left to the executive by legislation. Such delegation is valid and may also be necessitated by the financial resources that would be available with the State at a given moment.
4. Though the quantum of compensation is not justiciable by the bar arising under Art. 31 (4) yet the court could examine whether the acquisition is for any public purpose. The purpose behind the Act is clearly to bring about a reform in the land distribution system of Bihar. This is a public purpose.

But the provision for acquisition of arrears of rent to pay 50 per centum to the Zamindars and to take 50 per centum to augment the revenues of the State is no public purpose.

5. But Sec. 23 (f) is a colourable piece of legislation as it has not been arrived at by laying down any principles of paying compensation but in truth is designed to deprive a number of people of their property without payment of compensation.

But the offending provisions of the Act are not so extricably bound up with the part that is valid as to hit and kill the remainder also. (Points 4 and 5 dissented to by Patanjali Sastri and Das, JJ.).

6. The contention that the field of legislation on the question of principles of determination of compensation and the mode and manner of payment of such compensation was already "occupied" by the Land Acquisition Act which was the existing law of Parliament, and hence, the State legislature could not enter on this field and legislate on the principles of payment of compensation—this argument has no force, as the provisions of the Land Acquisition Act can only apply to acquisitions that are made by notification under that Act. They have no application to acquisitions made under either local or Central Laws, unless they are specifically made applicable by the provisions of these statutes. Hence the doctrine of occupied field has no application in the instant case.
7. Our Constitution has raised the obligation to pay compensation for the compulsory acquisition of property to the status of a fundamental right and it has declared that a law that does not make provision for payment of compensation shall be void. The two heads of entries, that is, Entry 36 List II and Entry 33 List I are mere heads of legislation and are neither independent nor complementary to one another. It is by force of the provisions of Article 31 (2) that it becomes obligatory to legislature providing for compensation under Entry 42 of the Concurrent List in order to give validity to a law enacted under Entry 36 and not by reason of the use of the words "subject to" in the wording of the Entry. The latter words only mean that whenever a law is made by a State legislature in exercise of the legislative power

under Entry 36, that law will be subject to the provisions of a parliamentary statute made in the exercise of its obligations under Entry 42.

8. The contention that the power to make a law under Entry 42 of List III is a power coupled with a duty and hence where the legislature has authorized expropriation under a law passed under that entry, it is also bound to make a law laying down the principles on which such owners should be compensated for their loss is not sound. Entry 42 was only an enabling legislative head. No court can issue a mandatory injunction to the legislature to provide compensation under Entry 42. Court's jurisdiction arises only in the application of Art. 31 (2) not under the legislative head Entry 42.
9. The scope of Art. 31 (4) is at once narrower and wider than Art. 31A.
10. The last words in Entry 42 "form and manner in which such compensation is to be given" clearly mean that the principles determining compensation must lead to the giving of payment of some compensation.
11. The expression "public purpose" is not capable of precise definition and has not a rigid meaning. It is elastic and takes colour from the statute it occupies, the concept varying with the time and state of society and its needs. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of the individual.
12. A charity created by a private individual is not immune for the sovereign's power to compulsorily acquire that property for public purpose. Such vesting of property in the State cannot affect the charity adversely as the net income derived from the properties is made the basis of compensation awarded to the charity. Most properties are not immune from the state's power of acquisition subject to the concept of just compensation.

In *P. Thambiran Padayachi and others v. State of Madras*⁷⁵ the Madras High Court held that acquisition of property for public purposes under Art. 31 (2) includes whatever results in advantage to the public. It is not necessary that it should be available to the public as such. It might be in favour of individuals provided they are benefited not as individuals but in furtherance of a scheme of public utility such as co-operative scheme of building houses in a slum area to relieve congestion and housing poor people. May be certain individuals are asked to give up their sites for the benefit of social welfare and prosperity of a particular poor section of the public.

In *Raja of Bobbili v. State of Madras*⁷⁶ it has been posited that every instance of taking as understood by later American decisions to mean substantial interference with private property, which destroys or lessens its use and value or by which the owner's right to use or enjoy it is abridged or destroyed in any substantial degree would not amount to acquisition within the meaning of Sec. 299 of the 1935 Government of India Act or Art. 31 (2) of the Constitution. Even giving the word "property" or "land" the widest connotation there should be an element of transference before it can be said that there

75. A.I.R. 1952 Mad. 756.

76. A.I.R. 1952 Mad. 203.

is an acquisition of any interest in land or in property. The Madras Estates Land Reduction of Rent Act XXX of 1947 provides for reduction of rents and for collection of rents by the Government. By such reduction, there is no "acquisition" of any "right" or "property" of the landlord as there is no transference of right though there is reduction. Collection of rent by Government is not acquisition but is only a sort of agency with the beneficial interest going to the landlord only minus the cost of collection. To regulate the relationship between landlord and tenant and to fix fair rent is permissible legislation in general public interest. As there is no acquisition no question of compensation arises.

In *Jupiter General Insurance Co. Ltd. v. Rajagopalan and another*⁷⁷ it has been held that to attract Art. 31, the following conditions have to get satisfied :

- 1 The impugned legislation must authorize the taking possession of or acquisition of property.
2. The property must be capable of possession or acquisition.
3. The acquisition or taking possession of property must be for public purposes.
4. And the acquisition or the taking possession of property must be without paying or providing for compensation.

The term "property" means in Art. 31 (2) "proprietary rights *in rem*", and so the benefits of a contract would not come within this meaning. A share-holder of the insurance company is not deprived of his property in the share merely because his right of voting at the election of directors has been kept in abeyance during the time of management by the appointed Administrator.

In *Shyam Krishen v. State of Punjab*⁷⁸ it was held that requisitioning of property under the Punjab Acts XVII of 1947 and XLVIII of 1948 with the avowed object of house accommodation and rent control was quite valid. Such temporary requisitioning is not acquisition.

In *Chiranjit Lal v. Union of India*⁷⁹ it has been held that the curtailment of incidental privileges of a share-holder to elect directors, to pass resolutions and to apply for winding up are merely reasonable restraints on the right to enjoy the share-holder's property in the share. But that is no deprivation of property within the meaning of Art. 19 (1) (f) or 31.

The Supreme Court has held in *D. K. Nabirajiah v. State of Mysore*⁸⁰ that the regulation of letting and subletting houses is rather the exercise of the police power in public interests than anything done in the exercise of a power of *Eminent Domain*, in which case alone questions relating to compensation and public purpose will arise.

In a Rajasthan case⁸¹ it has been held that Cl. (25) of the Rajasthan Food Grains Control Order which provides for requisitioning of stocks at the rate fixed for purposes of Government procurement is void as it offends Art. 31 (2) as fair compensation has not been fixed in law for acquiring the food grains.

77. A.I.R. 1952 Punj. 9.

78. A.I.R. 1952 Punj. 71.

79. A.I.R. 1951 S.C. 41.

80. A.I.R. 1952 S.C. 339.

81. *Nathmal and another v. Commissioner of Civil Supplies, Rajasthan*, A.I.R. 1952 Raj. 74.

When no ceiling price is fixed by Government, the price of procurement cannot be less than the ordinary market rate.

In *Kalika Kumarasinghi Lagdhirji v. Saurashtra*⁸² it has been pointed that since Art. 31 (3) postulated that private property can be acquired for a public purpose only, a law covered by Art. 31A will not be saved if it dispenses with this inherent requirement. The object of the Saurashtra Land Reforms Act, 1951, as the preamble says, is the improvement of land revenue administration and the ultimate doing away with the Girasdari system and making the tenants the occupants of the land held by them. The Act is *intra vires* as it also provides for payment of compensation.

In *Mahmad Naboo v. State of Travancore-Cochin*⁸³ it has been posited acquisition for housing fisher folk by a co-operative scheme is for a public purpose. "Public purpose" is a justiciable issue despite the provision 6 (3) of the Land Acquisition Act to the effect that the declaration under Sec. 6 (1) shall be conclusive evidence of the public purpose.

In *Dr. Bhagwant Kishore Tandon v. Deputy Commissioner, Rewa*⁸⁴ it has been stated that the words "acquires or takes possession" are comprehensive enough to include both acquisition which is a complete deprivation of all the interests in the property and requisition which is taking for a limited period or a limited purpose. Property includes "any interest" such as mortgage, lease or tenancy. The U. P. Requisition of Building and Premises and Fixation of Rent Ordinance 3 of 49 was struck down as it made no mention of any public purpose and provided for no compensation.

In *Sudhindranath Datta v. Sailendranath Mitra*⁸⁵ the Calcutta High Court while upholding the West Bengal Premises Requisition and Control Act V of 1947 has stated that housing a high Minister of State is clearly a public purpose and that for a court to hold orders of Government are *mala fide* facts must be established upon which court can affirmatively hold that an order was not honestly made or not made under a particular provision. Mere suspicion is not sufficient.

*Gobinda Chandra Dakua v. Dinesh Chandra Maitra*⁸⁶ held that the Bengal Food Grains (Disposal and Acquisition) Order, 1947, was *intra vires* and that the question of compensation depended upon the economic conditions prevailing in the country and that the ceiling price fixed by the Government should be treated or accepted as the measure of just compensation. The latter term cannot mean that the Government must compensate the owner of the paddy for potential profits lost because of economic distress in the country and consequent price control. Fair market rates have to be accepted as a just standard and if that is difficult to find out or it causes manifest injustice to owner or public court can apply other standards⁸⁷.

The West Bengal Land Development and Planning Act was held *intra vires* in *Aswini Kumar Nath v. State of West Bengal*⁸⁸ as settlement of immigrants should be considered as a public purpose necessitating the acquisition. Though there is no provision in so many terms for out and out compensation yet Sec. 4

82. A.I.R. 1952 Sau. 115.

83. A.I.R. 1952 T.C. 522.

84. A.I.R. 1952 VP. 78.

85. A.I.R. 1952 Cal. 65.

86. A.I.R. 1952 Cal. 100.

87. *United States v. Commodities*

Trading Corporation Et. Al (1950) 339 U.S.R. 121 cited in A.I.R. 1952 Cal. 100 above.

88. A.I.R. 1952 Cal. 679. See also *Md. Saffi v. State of West Bengal*, A.I.R. 1951 Cal. 97.

of Act 21 of 1948 deals with the question of payment of damages that may be caused during temporary occupation of lands by reason of acts done as contemplated by the section itself. But there is something to be said in favour of the argument that the assessment of damages had been arbitrarily left to the Collector to determine without any recourse to a medical pronouncement on the matter.

In another Calcutta case⁸⁹ it has been held that there can be no acquisition for a private purpose and that the provision in Sec. 8 of West Bengal Land Development and Planning Act 21 of 1948 was *ultra vires* inasmuch as it left the declaration of the Government conclusive as to the nature of the purpose.

In *Naba Kumar Seal v. State of West Bengal*⁹⁰ it has been posited that so long as there are provisions for payment of just compensation Art. 31 (2) is complied with. The manner or the time of payment may be such as is determined by the legislature.

In *Mst. Govindi v. State of Uttar Pradesh*⁹¹ it was held that in the U. P. Zamindari Abolition and Land Reforms Act 1 of 1951, all the proprietary rights of the intermediaries had been acquired. No doubt, Sir and Khudkhast lands have been allowed to be retained by them in their capacity as Bhumidars but it is a new tenure created by the Act and the Bhumidars are not proprietors. The proprietary rights under the Act vest in the State. It cannot, therefore, be said that the entire proprietary rights of the intermediaries had not been acquired under the Act and as such it is invalid as Article 31 authorizes any acquisition—that is the entirety of the rights in any property.

In *Bhanjee Nunjee v. State of Bombay*⁹² it has been posited that the purpose which has for its primary object the general interest of the community is a public purpose. Though the Government are *prima facie* the best judges of what public interest is, yet when the court is satisfied that the former's opinion is capricious, arbitrary or unreasonable, the statute can be struck down. Hence Sec. 6 of the Bombay Land Requisition Act XXXIII of 1948 which provides for requisition for allotment not to Government servants as a whole but to Government servants who are the first informants of the vacancy was held *ultra vires*. This completely ignores the needs of the majority of the public and is capriciously given to "chance" and hence could not be a public service.

The Supreme Court held in *Ramjilal v. Income Tax Officer*⁹³ that Article 31 (1) must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax for otherwise Art. 265 becomes wholly redundant. The Constitution has treated taxation as distinct from compulsory acquisition of property and has independent provision giving protection against taxation except by authority of law.

In *Kameshwar Singh v. State of Bihar*⁹⁴ it has been pointed out that the substitution of the words "for compensation" in clause (2) of Art. 31 instead of "for the payment of compensation" as clear in Sec. 299 of the Government of India Act, 1935, indicates that compensation may now be given not in money but in bonds or possibly in land, the reason being when large numbers of individuals are to be expropriated under a scheme of land reform it may be

89. *W. B. S. K. Co-operative Cr. Society v. Mrs. Bellu Banerjee*, A.I.R. 1952 Cal. 584.

90. A.I.R. 1952 Cal. 370.

91. A.I.R. 1952 All. 88.

92. A.I.R. 1952 Bom. 476.

93. 1951 S.C.J. 203.

94. A.I.R. 1951 Pat. 91.

impossible to compensate them in money and sometimes it may be in the interests of the expropriated to receive land elsewhere rather than money. Compensation must be the equivalent money value of the property and not any arbitrary value put by the legislature, so as to make it almost confiscatory instead of compensatory.

In *Manohar Ramakrishna v. G. G. Desai*⁹⁵ the act of requisitioning accommodation under the C.P. and Berar Act, LXIII of 1943 has been held *intra vires* on the ground that a public office exists for the benefit of the public and so locating such office is a public purpose. Requisition for a Government servant's accommodation is a public purpose. The officer is thereby enabled to discharge his duties properly. Want of accommodation may reduce his efficiency.

In *Raja Surya Pal Singh v. U. P. Government*⁹⁶ it has been held that the words "subject to the provisions of Entry 42 in List III" in Entry 36 List II means only that when a State acquires property the principles on which compensation is to be determined may be fixed either by the State legislature or by the Union. They have nothing to do with legislative competence. They do not denote that the legislature cannot legislate with respect to the acquisition of property unless there is a public purpose and on payment of compensation. The safeguard against confiscatory acquisition of property is to be found in Art. 31 (2), the provisions of which are not fetters to legislation but are conditions of legislative effectiveness. The acquisition of property by the U. P. Zamindari Abolition and Land Reforms Act, 1951, is to implement one or more of the Directive Principles of State Policy which is clearly a public purpose. The court must respect legislative discrimination in the choice of schemes for social legislation. Even where the social undesirability of a law may be conveniently urged, invalidation of the law by a court debilitates popular democratic government. For most laws dealing with economic and social problems are matters for trial and error⁹⁷. It has been further posited in the instant case⁹⁸ that the word compensation in Art. 31 (2) means an equivalent in value of the property taken or acquired, subject only to the qualification that such equivalent need not be paid in money. But if the provision for compensation is discriminatory it offends Art. 14 and thereby also Art. 31 (2) as discrimination means variation in payments based on something other than the value of the property acquired.

In *Dwarakdass Shrinivas v. Sholapur Spinning and Weaving Co. Ltd.*⁹⁸ it has been held that although Art. 31 (2) does not in terms state that acquisition or taking possession of can only be for public purpose, reading that clause as a whole it is clear that it is implicit in the power conferred upon the legislature to legislate for the purpose of acquisition or taking possession of the property. The term "property" can only mean that kind of property which is capable of being acquired or taken possession of and it is this category whose loss can be compensated for. Art. 31 (2) applies when there is transfer of ownership. If totality of rights are not acquired or taken possession of but only some of them Art. 19 (f) applies. "Taking possession" is wider than "requisitioning". Whether it is 'acquisition' or "taking possession of" it must be the totality of the whole bundle of rights involved in each category. The term "deprivation" is wide in significance than "acquisition" or "taking possession". Mere right of management of the factory is not 'property'. Even if it were

95. A.I.R. 1951 Nag. 83.

96. A.I.R. 1951 All. 674.

97. See *American Federation of Labour v. American Sash and*

Door Coy., 335 U.S. 538.

98. A.I.R. 1951 Bom. 86 Note: Reversed later in A.I.R. 1954 S. C. 119 *vide infra*.

reasonable restriction for public interest is permissible under Art 19 (5). The preamble of the Act shows that the object was the production of essential commodities and the removal of serious unemployment amongst a section of the community. Actual user by the public is not needed to make a public purpose under Art. 31 (2). It is enough if the purpose is to benefit the public.

In *Heman Santlal v. State of Bombay*⁹⁹ Sec. 6 of the Bombay Land Requisition Act XXXIII of 1948 entitled the executive to requisition property not only for a public purpose but for any purpose. This contravened Art. 31 (2) but as it was an existing law it was saved by Art. 31 (5) (a) as it was enacted by a competent legislature more than eighteen months before the coming into force of the Constitution.

In *Abdul Majid v. P. R. Nayak*¹⁰⁰ it has been posited that courts must be careful to see that any deprivation of property by the State is not too easily put in the category of deprivation referred to in Art. 31 (1) so as to entitle the State to take possession of the property of the subject without the very salutary limitations cast on it under Art. 31 (2). When the property merely vested in the Custodian of Evacuee Property by the ordinance, there is taking possession of as connoted in Art. 31 (2) but by reason of Art. 31 (5) no compensation is called for in such cases.

In *Khoja Masumali Kanji of Talaya v. Custodian of Evacuee Property, Rajkot*¹ it has been held that mere taking by the Custodian of the management of a mill in which the evacuee had a half share is not deprivation of property of the other sharer as this was the only mode to administer unless a suit for partition is filed. The taking over of possession was a mere administrative or executive act.

In *S. Asrar Ahmad v. State of Ajmer*² it has been stated that the decision of the District Magistrate both about the purpose and the need for which a house is being requisitioned is in the absence of any proof of any *mala fide* on his part is a final one on the point of public purpose. In another case³ the same court has held that even when a person has been deprived only of his right to possess and enjoy property it amounts to deprivation of property within Art. 31 though he continues to be the owner of the house⁴.

In *Santhana Krishna v. Vaithilinga*⁴ the Madras High Court upheld the Tanjoor Tenants and Pannaiyal Protection Act 14 of 1952. It posited that once the object of the statute and the means to secure it were found reasonable it was no objection to its validity that it incidentally conferred rights on persons who were not in themselves intended to be beneficiaries. The scheme of the Act must be looked into as a whole as a social legislation resolving the conflicts *inter se* the landlord and tenant so as to secure public good, amity and greater production and the improvement of the economy of the poor tenants and farm labourers who formed a definite section of the public.

It is no less a public purpose simply because it ultimately benefits individuals. Art. 31 (2) can apply only to acquisitions by State or the Union. In other cases Art. 19 (1) (f) and Art 19 (5) will apply if it is a law which confers rights of ownership or possession on individuals, the State itself not acquiring it. The contention that taking possession from Mirasdars is property deprivation and should be compensated was negated since in Art. 31 the

99. A.I.R. 1951 Bom. 121.

100. A.I.R. 1951 Bom. 440.

1. A.I.R. 1951 Sau. 73.

2. A.I.R. 1954 Ajmer 1.

3. A.I.R. 1954 Ajmer 3.

4. A.I.R. 1954 Mad. 51.

paramount thing is that there should be transference of ownership or the entire bundle of rights regarding title or possession. The American law is, however, different for there compensation can be asked for even when there is some diminution in the rights of an owner. Thus in America emission of smoke and gas by railway locomotives lessened the utility of the adjacent lands and thus the rights of the owner⁵. A law restraining the owner from excavating mines in his lands was such diminution of rights⁶; constant flying of aeroplanes over one's lands⁷ or a dam across the Mississippi damaging the adjacent land⁸ were all held to amount to "taking of property", which term obviously included "diminution of any right to property by one's action".

In the instant case⁴ the Madras High Court has held the diminution of the rights of Mirasdars by the operation of the Act will not amount to "taking" within the meaning of Art. 31 (2).

In *Mahammad Habibuddin v. Govt. of Hyderabad through Custodian of Evacuee Property*⁹ it has been pointed out that the necessity of confirmation of a sale in Sec. 40 (Administration of Evacuee Property Act, 1950) being reasonable, constitutional and in the exercise of police power, the absence of any provision relating to compensation which is a limitation on the exercise of the power of *Eminent Domain* does not make Sec. 40 *ultra vires* of Art. 31. This is quite in keeping with the observations of the Supreme Court Judge Mr. Chandrasekhara Ayyar in *Nabhirajiah v. State of Mysore*¹⁰ that Sec. 75A of the Defence of India Rules "was an exercise of the police power of regulation in public interest than anything done in the exercise of a power of *Eminent Domain* in which case alone questions relating to compensation and public purpose will arise".

In *Brundaban Chandra v. State of Orissa*¹⁰ a case arising under Orissa Court of Wards Act 26 of 1947, it was pointed out that depriving the proprietor temporarily of his management of the property for the professed purpose of benefiting the very proprietor offended neither Art. 31 (1) or Art. 31 (2).

In *Hira Singh Bam v. State of Himachal Pradesh*¹¹ where A purchased a State house from Government—the latter reserving right to repurchase it by specific term in the sale deed; the Deputy Commissioner without any authority under law or statute asked A to vacate within a month. The order was *ultra vires* of Art. 31 as it amounted to deprivation by the State of A's property.

In *Bhaskar v. Mohd. Alimulla Khan*¹² it was posited that restrictions should not be greater than the mischief intended to prevent and that it should be in the interest of the general public to place them. It is for the legislature to scrutinize the need for restrictions and also to decide upon their reasonableness. Of course, the latter is justiciable when challenged. Taking away or restricting certain rights of the landlord by the Berar Land Revenue Code is not deprivation within the meaning of Art. 19 (5) or Art. 31 (2). In the instant case the interests of law and order and good government required such restrictions on the landlord's right to evict tenants.

5. *Richards v. Washington Terminal Co.*, (1914) 58 Law. Ed. 1038.

6. *Pennsylvania Coal Co. v. Mohan*, (1922) 64 Law. Ed. 322.

7. *United States v. Causby*, (1946) 90 Law Ed. 1206.

8. *United States v. Kansas City Life Insurance Co.*, (1950) 94 Law. Edn. 1277.

9. A.I.R. 1953 Hyd. 156.

10. A.I.R. 1953 Orissa 121.

11. A.I.R. 1953 H.P. 56.

12. A.I.R. 1953 Nag. 41.

In *Manohar Singh v. State of Rajasthan*¹³ it has been posited that mere right to collect revenue is not property and hence taking possession and management of Jagir under Ordinance Nos. X and XV of 1949 do not attract Art. 31 (2).

In *Raj Rajendra Malojirao Shitole v. State of M. B.*¹⁴ it has been held that the public purpose need not necessarily be expressly stated. It can be gleaned from the general tenor of the Act. The test is if it benefits the community at large. Public purpose is a creature of time and circumstance and the concept changes from time to time. The object of the M. B. Act 28 of 1951 is ostensibly inspired and dominated by the public purpose of extinguishing intermediaries between the ryot and the State.

In *Surajmal v. Rajasthan State*¹⁵ it has been pointed out that Art. 31 (1) is wider in its application than Art. 31 (2). There can be deprivation of a person's property without acquisition or taking possession by the State. In such cases Art. 31 (1) provides that there should be authority of law for such deprivation. In this context there is no need to import foreign concepts as "police power" or "*Eminent Domain*". Deprivation under Art. 31 (1) could only be by authority of law and as per Das, J., in *Chiranjit Lal v. Union of India*¹⁶ no question of compensation then arises. Deprivations under clause (2) of Art. 31 should be such as "acquisition" or "taking possession of" in public interest. It is these alone that call for compensation. "Deprivations which are not 'acquisitions' or 'taking possession' cannot, therefore, entail compensation.

In tenancy laws there will inevitably be diminution of rights of landlords but that is to be expected in any social and economic reform vis-a-vis landlord and tenant¹⁷. In the instant case the Orissa Tenants' Protection Act 3 of 1948 was held *intra vires* though it benefited only a class of tenants as Bhagchasis.

In *Narayan Prasad v. Indian Iron and Steel Co.*¹⁸ the Calcutta High Court opined that the legislative powers to pass laws authorizing deprivation of property is not limited by reference only to Entry 33 of List I or Entry 36 List II. Art. 31, itself contemplates the existence of the requisite powers. In *Shamdasani v. Central Bank of India*¹⁹ Patanjali Sastri, C.J., said, "It is not correct to suggest that merely because there is no entry in the lists of Schedule 7 relating to 'deprivation of property' as such it is not within the competence of the legislatures in the country to enact a law authorising deprivation of property It is futile to deny the existence of the requisite legislative power". In fact Entry 1 of each of the Lists I, II and III enable that. Article 31 (1) itself contemplates a law being passed authorizing deprivation of the properties. Again in *State of Bihar v. Kameshwar Singh*²⁰ the same judge posited, "The entries in Schedule 7 are designed to define and delimit the respective areas of legislative competence of the Union and State legislatures and such context is hardly appropriate for the imposition of implied restrictions on the exercise of legislative powers which are ordinarily matters of legislative enactment in the body of the Constitution".

In *Rebati Ranjan v. State of Bihar*²¹ S. 32 (2) and S. 24 (3) of the Bihar Land Reforms Act 30 of 1950 have been sustained as *intra vires* of Art.

13. A.I.R. 1953 Raj. 22.

14. A.I.R. 1953 M.B. 97.

15. A.I.R. 1953 Raj. 78.

16. A.I.R. 1951 S.C. 41.

17. *Sashibhushan Pati v. Mangala*

Biswal, A.I.R. 1953 Orissa 171.

18. A.I.R. 1953 Cal. 695.

19. A.I.R. 1952 S.C. 89.

20. A.I.R. 1952 S.C. 252.

21. A.I.R. 1953 Pat. 121.

31 (2). Reading the two sections together it is manifest that in the case of a perpetual premium payable to trustees of a religious or charitable endowment the compensation officer is bound to make payment in cash. In those sections the statute has specified the principle and the manner in which compensation is to be determined and given for properties of a religious or charitable endowment and there is no violation of the guarantee of Art. 31 (2) of the Constitution.

In *Prithi Singh v. State of Pepsu*²² it has been posited that the existence of a public purpose is not a condition precedent for the validity of a legislation under cl. (2) of Art. 31. But the clause assumes that when a legislation authorizes acquisition or requisition it does so only for a public purpose. If it is shown that there was no public purpose involved then the law is void as inconsistent with Art. 31, cl. (2). In the instant case²² the Farman-i Shahi 11 of 11th March, 1947 and the Patiala and East Punjab States Abolition of Biswadari Ordinance 23 of 2006 were held valid and made for a public purpose. The Ordinance in the instant case was upheld as it did not allow the State to acquire the landlord's share for the tenant but merely allowed the tenants the right to purchase the share straightway without the intervention of the State.

In *Maharaja Kishangarh Mills Ltd. v. State of Rajasthan*²³ it has been held that the Industrial Disputes Act, 1947 aimed at harmonising the relationship between the employer and the employees and is not aimed at depriving either of them of "property". So to force a millowner to work the mills by prohibiting a strike or lock-out, will result in losses and thus would amount to deprivation of property.

*Mahindra Mohan Lahiri v. State of Assam*²⁴ posits that management *simpliciter* is not acquisition. In Art. 31 no express provision similar to sub-sec. (5) of S. 299 of the 1935 Act is made for the simple reason that Art. 31 (2) has been so worded as to include the substance of sub-sec. (5) of Sec. 299.

Requisitioning of houses under the Madras Buildings (Lease and Rent Control) Act 25 of 1949 does not infringe Art. 19 (1) (f) but comes directly under the purview of Art. 31.²⁵ The same High Court has held that Sec. 10 of the Madras Estates Land (Reduction of Revenue Second Amendment) Act 35 of 1951 which provided for adjustment of rent paid by the ryot before the commencement of the Amending Act, is quite *intra vires* and not confiscating at all. It is only an adjustment of account between landholder and tenant and there is no acquisition by the State of any portion of the rent²⁶.

If the legislature confers limited powers on the executive for requisition and specifies the purpose in the Act itself no special statement that requisition or acquisition under the Act can only be for public purpose is unnecessary²⁷. Giving land to the landless, flood-affected and displaced persons is public purpose.

In *Devi Dayal v. State of Patiala*²⁸ certain Government orders which infringed the petitioner's rights under Art. 31 were not questioned for over a year. Though there is no estoppel, yet such waiver is conceivable. At any rate after such waiver a writ under Art. 226 will not lie.

22. A.I.R. 1953 Pepsu 161.

23. A.I.R. 1953 Raj. 183.

24. A.I.R. 1953 Ass. 84.

25. *Fatima Bi v. State of Madras*,
A.I.R. 1953 Mad. 257.

26. *N. Gopalan v. State of Madras*,
A.I.R. 1953 Mad. 260.

27. *Assam Company Ltd. v. State of Assam*, A.I.R. 1953 Ass. 177.

28. A.I.R. 1953 Pepsu 9.

The Supreme Court sustained the Orissa Estates Abolition Act 1 of 1952²⁹ and stated that there was no law prohibiting the State from acquiring buildings etc., lying within an estate and which were primarily used for management or administration of the estate. This was an integral part of the abolition scheme. If the compensation given was not just in the instant case Art. 31 (4) provided the answer.

In *K. C. Gajapati Narayan Das v. State of Orissa*³⁰ it has been postulated that under the law of *Eminent Domain* the concept of just compensation has the following attributes :

- (1) Market value payable on footing of compulsory sale.
- (2) Determination of compensation by judicial tribunal.
- (3) Payment of compensation in cash on the date when possession is taken unless any other method and manner of payment is consented to by the dispossessed proprietor.

But with the Zamindari abolition cases the word compensation cannot be said to involve just compensation of the American pattern particularly in cases where Art. 31 A and Art. 31 (4) apply. The guarantee of Art. 31 is satisfied when the statute specifies the compensation or lays down the principles thereof.

In a Calcutta case³¹ compensation has been taken to mean only just compensation, that is to say, a just equivalent in value. It is justiciable just as requisition is "for a public purpose"³². There can be requisition for occupation of a Government servant in public interests even if the landlord is against such requisition³³. This is on the principle that the interests of the public and that of the Government will otherwise be jeopardised. The taking over of management of an individual's forest is taking "property" under Art. 31 and the restriction on the owner is quite reasonable under Art. 19 (1) (f) as it is in public interest. Though the owner is a trustee or Shebait his application of trust money from the yield of the property is in no way affected by the state taking over the management³⁴.

In the latest Supreme Court case *Dwarakadas Shrinivas v. Sholapur Spinning and Weaving Company*³⁵ the decision in A.I.R. 1951 Bom. 86 has been overruled. Their Lordships have held that Ordinance 2 of 1950 which empowered the Government taking over the Company's management is *ultra vires* as it overstepped the limits of legitimate social control legislation and contravened the Fundamental Right vouchsafed in Art. 31 (2). The Ordinance clearly lead the Government in substance to take over the undertaking itself, not the mere management of it. Practically all incidents of ownership have been taken over by the State and all that has been left with the company is mere paper ownership. Thus the Government chose to dismiss all directors, appoint new ones, carry on with its own

29. *K. C. G. Narayan Das v. State of Orissa*, A.I.R. 1953 S.C. 377.

30. A.I.R. 1953 Orissa 135.

31. *Atulya Kumar v. Director of Procurement and Supply*, A.I.R. 1953 Cal. 548.

32. *Abdul Hamid v. State of West*

Bengal, A.I.R. 1953 Cal. 223.

33. *C. Nataraja Mudaliar v. Mad. State*, A.I.R. 1953 M. 252.

34. *Shri Durgaji v. State of Bihar*, A.I.R. 1953 Pat. 65.

35. A.I.R. 1954 S.C. 119.

new agents, with the shareholders having no voice in the matter. The purpose stated in the Ordinance is to keep the labour going and contented and to maintain the supply of essential commodity, whereas the Company's charter debars any such endeavour. The impugned legislation is hence not regulative but is clear acquisition of property offending Art. 31 (2). It is not a legal emergency police power but has overstepped it. It is nothing short of expropriation by way of the exercise of the power of *Eminent Domain* nullified by the provision in Art. 31 (2).

Bose, J., has viewed in the instant case that while Art. 19 (1) (f) confers a right on all citizens, and the right to property is stressed therein in relation to the person of the citizen, Art. 31 relates to property itself. Art. 31 (1) is a sort of corollary, namely, that after property has been acquired it cannot be taken away except by authority of law. Art. 31 is wider than Art. 19 as it applies to every one including non-citizens. In effect Art. 19 (1) (f) postulates no citizen can be deprived of his right to acquire and hold property. But a non-citizen can be so prevented. Once no law is there to prohibit such acquisition by a non-citizen, in the field of deprivation the non-citizen is as much protected in Art. 31 as a citizen.

Mahajan, J., has stated that the words "acquisition" and "taking possession" used in Art. 31 (2) have the same meaning as the word "deprivation" in Art. 31 (1) and so Art. 31 (1) and (2) should be read together as embodying the same topic of compulsory acquisition, i.e., the field of *Eminent Domain*. This view is the same as posited by Patanjali Sastri, C.J., in A I R. 1954 S. C. 92. *State of West Bengal v. Subodh Gopal Bose*, J., however, has felt that there must be substantial deprivation so as to attract Art. 31 (2) and that anything short of it will be controlled only by Art. 31 (1). This view accords with that of Jagannath Dass in A I R. 1954 S C. 92.

Defining "property" S. R. Das has said mills, machineries, stocks etc., are property as also a contract or agreement which a person may have with the company. The rights of share-holders to vote, to elect directors, to wind up company are attributes of their proprietary rights and not "property" itself. "Property" is the whole bundle of "real and incorporeal rights". It includes any interest in any commercial or industrial undertaking. It also includes any interest in "any company owning any interest in any commercial or industrial understanding".

The decisions in A.I.R. 1951 Cal. 111 and 1952 Cal. 554 were upheld by the Supreme Court in the *State of West Bengal v. Mrs. Bella Banerjee*³⁶. Their Lordships held that while the legislature had the undoubted power to lay down the principles of compensation, compensation given must be a "just compensation", i.e., a just equivalent of what the owner had been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court. Any fixation of compensation without reference to the value of the land at the time of acquisition and to take the ceiling price as on a particular date without regard to the increment in value at the time of acquisition, was held arbitrary and rendered the West Bengal Land Development and Planning Act 21 of 1948 void.

36. A.I.R. 1954 S.C. 170.

In the latest Calcutta case *Ramjiban Gurchait v. State of West Bengal*³⁷, the Essential Supplies (Temporary Powers) Act and W. B. Foodgrains (Intensive Procurement) Order, 1952, read with the specification of prices etc., under notification No. 10365 F. D. has been held *intra vires* as it fixes the amount of compensation and the manner and principle of its determination and therefore is a sufficient compliance with Art. 31 (2). The instant Act enables promulgation of a law or an order and hence the instant order which arose after the Constitution cannot be termed as an existing law within Art. 31 (5) to escape compensation. An existing law must be complete in itself and the impugned "order" is the result of a prior Act and is later in origin to the Constitution.

In a Calcutta case³⁸ it was held that on the true construction of Sec. 3 (1) of West Bengal Premises Requisition and Control (Temporary Provisions) Act 5 of 1947 the factual existence of a public purpose depends entirely on the subjective satisfaction of the provincial Government and is not justiciable.

In *Mordhwaj Singh v. V. P. State*³⁹ it has been held that a Mahua tree is not merely just a piece of private property but one of general public utility, especially in times of famine. So the acquisition of Mahua groves is one for public purpose. As regards compensation it has been held that it is a trite proposition of economics that the market price can be ascertained and exists in fact, only where a small fraction of the total property in existence comes up for sale. But when by a fiat of law, which the State legislature is no doubt competent to pass, most of the proprietary interest is being acquired, then there cannot be a proper market price in the true sense of the term. Looked at that way any discussion of market price or a *quid pro quo* as the measure of adequate or reasonable compensation is bound to be futile when there is an acquisition of entire proprietary interest.

The Supreme Court has posited in *State of Rajasthan v. Nath Mal*⁴⁰ that the last portion of clause 25 of the Rajasthan Food Grains Control Order (1919) was repugnant to Art. 31 (2). The clause by vesting the power in the authority to acquire the stocks at any price fails to fix the amount of the compensation or specify the principles on which the compensation is to be determined. The clause leaves it entirely to the discretion of the executive authority to fix any compensation it likes and thus offends against Art. 31 (2).

In *Sagir Ahmad v. Government of Uttar Pradesh*⁴¹ it has been posited that the right to compensation does not arise on mere deprivation of property. The right to compensation arises only when after deprivation there has been a vesting in the State of that property, or there has been deprivation by acquisition. Further, that property must be traceable to the earlier owner who has been deprived of it before any question of compensation arises.

In the instant case⁴¹ the right under the permit to ply vehicles under the Motor Vehicles Act is not right available against all others. A privilege or an immunity of a right in order to be property must be available against all others. The petitioners' common law right to use the "public highways" in a particular manner under a permit cannot be any right in property or an interest in an undertaking within the meaning of Art. 31. To merely prohibit

37. A.I.R. 1954 S.C. 57.

38. *Srinivas Kedwal v. State of West Bengal*, A.I.R. 1954 Cal. 171.

39. A.I.R. 1954 V.P. 24.

40. A.I.R. 1954 S.C. 307.

41. A.I.R. 1954 All. 257.

the petitioners from operating their buses on certain routes is placing a reasonable restriction and there was no "taking of property" at all and much less does it call for any provision for compensation. Hence the Uttar Pradesh State Road Transport Act was held quite *intra vires*.

But in appeal the Supreme Court has held⁴² that the said Act 2 of 1951 was unconstitutional inasmuch as it offended Art. 31 (2). The effect of prohibition of the trade or business of the appellants by the impugned legislation amounts to deprivation of their property or interest in a commercial undertaking. No question of acquisition arises. Property of a business may be both tangible or intangible. Business of running buses on hire is intangible property.

In *Mohd. Kerar Ali v. State of U. P.*⁴³ the U. P. Private Forest Protection Act 6 of 1949 was sustained. The Act was passed to conserve forests. Private owners have not thereby been divested of any of their rights in forests, groves or trees. Only no cutting, collecting or removing of timber could be done without permission of the Forest Officer. The restrictions are subject to the permit issued. The owner's right to the property is otherwise intact. No dispossession or acquisition arises in this case. Hence Art 31 (2) has no application at all in the instant case.

In *Amar Singh v. State of Rajasthan*⁴⁴ the acquisition effected by the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952, was held to be for a "public purpose". The latter phrase has to be construed according to the spirit of the times in which particular legislation is enacted. Whatever furthers the general interests of the community as opposed to the particular interest of the individual must be regarded as a public purpose. The proper approach is to take the scheme of the legislation as a whole. In the instant case just and fair compensation also was levied. The public purpose is to lead to a better distribution of landed property for the benefit of the agriculturists.

"Requisition" is included within the term "acquisition" in Art. 31 (2) and the power that is exercised under the Bombay Land Requisition Act is under the sphere of *Eminent Domain* and there is no question of any reasonableness of restriction in the enjoyment of the property as Art. 19 (5) read with Art. 19 (1) (f) does not apply at all⁴⁵.

If the award for compensation is not accepted by the person deprived of his land under Sec. 218 (4) of the C. P. Land Revenue Act, the same section provides fixation of compensation by a civil court in accordance with the provisions of the Land Acquisition Act, 1894. Sec. 218 (4) is quite *intra vires* of Art. 31 (2); Sec. 218 (5) which authorizes taking of possession even before paying of compensation is also *intra vires* as a definite machinery for realization of compensation is fixed in the statute⁴⁶. Payment of the compensation amount is not a condition precedent to the vesting of title to the estate in the Government⁴⁷.

42. *Saghir Ahmed v. State of U.P.*
A.I.R. 1954 S.C. 728.

43. A.I.R. 1954 All. 753.

44. A.I.R. 1954 Raj. 290.

45. *Pritip Pandurang Pitale v. State of Bombay*, A.I.R. 1955 Bom. 271.

46. *Durga Prasad v. State of Madhya Pradesh*, A.I.R. 1955 N.U.C. (Nag.) 2459.

47. *Raja Jagaveera Rama Mutlu Kumara Venkatesaware Ettappa Naicker v. State of Madras*, A.I.R. 1955 N.U.C. Mad. 2432.

The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act 50 of 1948 has been held *intra vires* of Art. 31 (2) as it provides for compensation and specifies the principles on which and the manner in which the compensation is to be determined⁴⁸.

When statutory rights abridging the right of ownership to property have been conferred upon the Government, the conditions prescribed by the statute for the exercise of such rights must be strictly fulfilled. If this is not done courts will afford relief to persons who are aggrieved by the non-compliance or nominal compliance with the provisions of the statute.⁴⁹ When the property has been lawfully acquired in the terms of Art. 31 then it can be of no avail to contend that the right guaranteed by Art. 19 (1) (f) must all the same remain inviolable⁵⁰.

It is by force of Art. 31 (2) that it becomes obligatory to legislate providing for compensation under Entry 42 List III to give validity to a law enacted under Entry 36 List II and not by reason of the use of words "subject to" in the wording of the entry. It all indicates that legislation under Entry 36 would be subject to any law made by Parliament in exercise of its legislative power under Entry 42⁵¹. Hence Entries 36 and 42 are mere heads of legislation neither inter-dependent nor complementary to one another.

The Supreme Court has held in a case that where a mill producing cotton yarn closed, an order passed by the Government handing over management of the mill to authorized controller is *ultra vires* of Art. 31 and that the impugned order is not warranted by the provisions of the Essential Supplies (Temporary Powers) Act, 1948, and the U. P. Industrial Disputes Act 28 of 1947⁵².

A law which regulates the relation of landlord and tenant is not one which takes property within Art. 31 (2) even though it has the effect of reducing his rights. To regulate the relations of landlord and tenant is not compulsory acquisition⁵³.

Art. 31 (2) does not mean that unless the compensation is first paid the right of a person to possession of his property cannot be infringed. If the law provides a machinery whereby the amount of compensation can be determined and paid, which is the ultimate object of Art. 31 (2) then there is no contravention of the Constitution.⁵⁴

Appointment of an *ad hoc* committee superseding the prior Managing Committee on the ground of mismanagement is *intra vires*. There is no vesting in the Managing Committee of property rights for eternity⁵⁵. Acquisition for rehabilitation of persons whose property had been priorly acquired for a public purpose is quite *intra vires*⁵⁶. A statute which prevents fragmentation and enables consolidation of holdings is reasonable⁵⁷.

48. *S. Gurusar Singh v. Punjab State*, A.I.R. 1955 Punj. 161.

49. *Dinshaw v. State of Hyderabad* A.I.R. 1955 Hyd. 203.

50. *Sampuran Singh v. Competent Officer*, A.I.R. 1955 Pepsu 143.

51. *Saiyad Badasaheb Motinayan v. State of Saurashtra*, A.I.R. 1955 Sau. 80.

52. *R. S. Seth Shanti Sarup v. Union of India*, A.I.R. 1955 S.C. 624.

53. *Kishan Singh v. State of Rajas-*

than, A.I.R. 1955 S.C. 795.

54. *Durga Prasad v. M. P. State*, A.I.R. 1956 Nag. 101.

55. *Bhim Chandra Mahto v. Dy. Director of Education*, A.I.R. 1956 Pat. 81.

56. *Tilak Ram Wadhwa Mal v. State of Punjab*, A.I.R. 1956 Punj. 83.

57. *Kure Singh v. State of Punjab* A.I.R. 1956 Punj. 88. See also *Kundan Lekha v. State*, A.I.R. 1956 Punj. 92.

Although the interest to own land free from payment of land revenue is an interest in property, to assess such land to land revenue is not such a deprivation of interest in property substantial enough to attract Art. 31 (2)⁵³.

Sec. 35, Madras Aliyasanthanam Act was held *intra vires*, the demand for partition putting an end to the Ejman's right to manage family property is but a regulation of the internal economy of the family not offending Art. 31 (2)^{59 69}. The Ejman's right to manage is not property within the meaning of Art. 19 or Art. 31. It is a system of single management where there is a multiplicity of co-proprietors based on the theory of implied consent of the latter. In America under the Fifth Amendment compensation has to be paid even though the "taking" of the property does not amount to acquisition or requisitioning of it⁷⁰. It is not necessary that compensation should be paid in advance of the occupancy of the land to be taken. But it should in any event be paid before the owner's occupation is disturbed⁷¹. It is not necessary that the compensation should be determined before the property is acquired⁷². The position in India is also the same⁷³.

Compensation may not only be paid to the owner of the property but also to the tenant who may be in occupation of the property and whose possession is sought to be disturbed⁷⁴. The C. P. and Berar Accommodation (Requisition) Act 63 of 1948 was struck down as it had not provided for payment of compensation to a tenant in possession⁷⁵. The provision relating to requisitioning from tenants was hence held *ultra vires*⁷⁵.

"Cash grants" are property and hence abolition of cash grants without compensation offends Art. 31 as it stood before the Constitution Fourth Amendment⁷⁶. In the instant case the Hyderabad Abolition of Cash Grants Act 38 of 1952 was struck down as *ultra vires*.

Justiciability of the quantum of compensation.

In America the quantum of compensation is justiciable. The test is if the expropriated owner got the equivalent of his property. The word "just" makes it more emphatic in the Fifth Amendment. Even the absence of the word "just" will not affect the situation. As Nichols states⁷⁷ :

"The adjective 'just' only emphasises what would be true if omitted, namely, that the compensation should be equivalent of the property. It has been said in this regard that it is difficult to imagine an 'unjust compensation'"

Ordinarily, the Supreme Court of America does not interfere with a state court's decision on the adequacy of damages unless the owner has been deprived of any compensation at all⁷⁸.

In Australia the test is laid down in S. 51 (XXX) as merely "just terms". In India Art. 31 (2) or Entry 42 of List III the word 'compensation' is not qualified by the word "just". The Supreme Court has, however,

58. *Grijananda Chandury v. State of Assam*, A.I.R. 1956 Assam 33.

59-69 *Santhamma v. Neelamma*, A.I.R. 1956 Mad. 641: I.L.R. 1955 M. 785.

70. *Rajah of Bobbili v. State of Madras*, A.I.R. 1952 Mad. 203.

71. *Sweat v. Rechel*, 40 Law Edn., 188: 159 U.S. 380.

72. *Bailey v. Anderson*, 326 U.S. 203.

73. *Naba Kumar v. State of W. B.*,

A.I.R. 1952 Cal. 870.

74. *Shyam Krishen v. State of Punjab*, A.I.R. 1952 Punj. 70.

75. *Manohar Ramakrishna v. G. G. Desai*, A.I.R. 1951 Nag. 33.

76. *Veernath v. Hyderabad*, (1957) 2 An. W.R. 324.

77. His work 'Eminent Domain', Vol. III, p. 829.

78. *McGovern v. N. Y.*, (1913) 229 U.S. 363. *Backus v. Fort Street*, (1896) 169 U.S. 557.

held in *State of W. B. v. Bela Banerjee*⁷⁹ that "compensation" means a full and fair money equivalent. A denial of this rendered the law void. The court could interfere with legislative determination where :

- (1) the provision of compensation is merely a cloak in what is otherwise a confiscatory legislation. The legislature may not lay down principles which may result in non-payment of compensation or which may end in not paying any compensation at all⁸⁰.
- (2) the compensation is based on factors quite unrelated to facts⁸¹.
- (3) the principle laid down by the legislature is arbitrary⁸².

In *Jagveera v. State of Madras*⁸³ the Supreme Court analysed the position and stated :

"Entry 42 of List III is undoubtedly the description of a legislative head and in deciding the competency of a legislation under the entry the court is not concerned with the justice and propriety of the principles upon which the determination of the compensation was to be made or the form and manner in which it was to be given. But even then the legislation must rest upon some principle of giving compensation and not of denying or withholding it, and a legislation cannot be supported which was based upon something which was non-existent or was unrelated to facts and consequently could not have a conceivable bearing on any principle of compensation". Art. 31 (2) and Sec. 299 (2) of the Government of India Act, 1935, did not require that the amount of compensation must be judicially determined as just or fair. All that they posit is that the law must (a) either fix the amount of compensation or (b) specify the principles on which the compensation is to be determined.

Thus the final authority is given to the legislature in respect of making compensation for acquisition. The scrutiny of the court is merely to check frauds on the Constitution *e.g.*, where the provision for compensation is not real but is merely a cloak for a confiscatory legislation. This is clearly the position after the change effected in Art. 31 by the Constitution Fourth Amendment.

The decisions in *Kameshwar v. State of Bihar*⁸⁴ and *W. B. Co-operative Society v. Bella*⁸⁵ had held that 'compensation' must be just compensation being the money equivalent of the property expropriated. That would make the quantum justiciable. In the Patna case⁸⁴ the Supreme Court⁸⁶ declared certain sections of the impugned Act as *ultra vires* in that they constituted a fraud on the Constitution, there being no compensation at all in reality. But they⁸⁶ did not declare that in all cases it must be the money equivalent to the acquired property. In the Calcutta case⁸⁵ the Supreme Court⁸⁷ clearly stated that it must be a just equivalent in money. In these circumstances the Government felt that it cannot push up speedily the socialistic schemes it had set out in her two Five-Year Plans if full value were payable. This then is the genesis of the Fourth Amendment whereby Art. 31 (2) read together

79. (1954) S.C. A. 41.

80. *State of Bihar v. Kameshwar*, A.I.R. 1952 S.C. 252.

81. *Gajpathy v. State of Orissa*, A.I.R. 1953 S.C. 375.

82. *State of W.B. v. Bella Banerjee*, (1954) S.C. A. 41 (46).

83. A.I.R. 1954 S.C. 257.

84. A.I.R. 1951 Pat. 91.

85. A.I.R. 1951 Cal. 111.

86. *State of Bihar v. Kameshwar*, 1952 S.C.R. 889.

87. *State of W. B. v. Bella Banerjee*, (1954) S.C. A. 41.

with Art. 31 (4) is suitably amended. After this amendment the adequacy of compensation is made non-justiciable. It is left to the final judgment of the legislature. No doubt, it was stated during the debate in Parliament that it was not the intention of Government to acquire property without paying any compensation.

What then is left justiciable after the amendment above referred to? We may say courts have yet some jurisdiction *e.g.* :—

- (a) If the Legislature in question has the Legislative competence to pass the law.
- (b) If the Law is for a public purpose.
- (c) If the acquisition or requisition has been taken by virtue of authority under law *e.g.*, excess of authority, *mala fide* exercise of the statutory power, compliance with the formalities or obligations laid down under the law—these are matters justiciable.
- (d) Though adequacy of compensation is non-justiciable, yet where the law does not fix the amount but merely lays down the principles on which and the manner in which compensation is to be levied courts can step in to see that the executive do not transgress the defined principles. If they do transgress the law becomes *ultra vires*.
- (e) Courts can also see if the legislature failed to lay down the necessary principles in fixing compensation *e.g.*, where the executive is allowed to exercise their arbitrary discretion without set principles to guide them⁸⁸.
- (f) Where no compensation is fixed at all or where no principles are laid to determine the same.
- (g) Where the impugned law offends any other Fundamental Right other than Art. 31 (2). Thus an unreasonable classification offending Art. 14 may arise where different principles or different amounts are fixed for two sets of lands compulsorily acquired, other than those specially safeguarded under Articles 31 A and 31 B.

The amended Art. 31 (2) makes it now clear that acquisition or requisition can only be for a public purpose which is certainly justiciable. Prior to the amendment only judicial decisions⁸⁹ made this apparent as an implied condition in Art. 31 (2).

In America as the Federal Government is supreme and is specially entrusted with a national purpose, the component States have no power of acquiring Federal property without getting the consent of the Federal Government. The position in India is vastly different as here the local authorities are not regarded as instruments of a State as in America. So the property of a local authority may be acquired by the Central Government of the Indian Union for purposes of the Union. Similarly, the State Government is empowered to acquire for State purposes except that it should not impair thereby the sovereignty of the State.

Sec. 35, Madras Aliyasanthanam Act was held *intra vires*, the demand for partition putting an end to Ejectment's right to manage property is but a

88. *State of Rajasthan v. Nathmal*,
A.I.R. 1954 S.C. 307.

89. *State of Bihar v. Kameshwar*
(1952) S.C.R. 889.

regulation of the internal economy of the family not offending Art. 31 (2)⁹⁰. The Ejman's right to manage is not property within the meaning of Article 19 or 31. It is a system of single management where there is a multiplicity of co-proprietors based on the theory of implied consent of the latter⁹⁰.

In *Biswambhara Singh v. State of Orissa*⁹¹ it has been posited that if the legislative thought that minor Zamindars should be compensated at a higher rate whereas big Zamindars should get compensation at a lower rate for high slabs of income, it is difficult to say that such principle is not inextricably bound up with the broader question of adequacy of compensation. Art. 31 (4) expressly prohibits a court from questioning the adequacy of compensation. Even if it be assumed that the impugned Act 1 of 1952 in the instant case⁹¹ (the Orissa Estates Abolition Act)—is not a law as referred in clause (4) of Art. 31, it is undoubtedly a "law" as described in clause (2) of that article as amended in 1955 and therefore would get the protection of that clause.

The word "property" in Art. 31 is not confined to immovable property and the elements of hereditability and enjoyment of the benefit without any rendition of services are sufficient insignia of property to invest the cash grants with the characteristic of property as used in the Article⁹². Expropriation of properties of all kinds has been made the subject of compensation whether the property be movable or immovable⁹². Post-Constitution enactments contravening the Constitution have no legal existence and consequently cannot be revived⁹².

The effect of the Fourth Amendment is that while a law for acquiring or requisitioning property for the State has to provide for compensation it need not make it obligatory for the State to provide for compensation in case of deprivation of property in favour of somebody else⁹³. So it has been held that the U.P. Acts XV of 1952 and XXXI of 1952 are *intra vires*, as the deprivation of the land is not in favour of the State nor do they deal with the requisitioning or acquisition of property dealing with tenancy laws and land tenures and transfers regulation. In such statutes the provision of compensation could validly be absent⁹³.

The Allahabad High Court has held⁹⁴ in a case arising under the Employees' State Insurance Act (1948) that the Employers Wage Bill have been increased only by a small amount it cannot be said that the proprietor's right in the factory is affected by Art. 31 (1) and (2). Mere deprivation of property without being accompanied or followed by acquisition of proprietary rights by the State cannot be acquisition within the terms of the amended Article 31⁹⁴.

Expropriation of properties of all kinds under the Constitution have been made the subject to payment of compensation; it is immaterial whether the property is movable or immovable⁹⁵. In the Hyderabad (Abolition) of Cash Grants) Act XXXIII of 1952 Sec. 3 (2) (b) contravened Art. 31 as it stood before the Fourth Amendment as there was no provision for compensation to the cash grant holders. Post-Constitution enactments contravening the Constitution have no legal existence and cannot be revived. Hence

90. *Santhamma v. Neelamma*, A.I.R. 1956 Mad. 641; I.L.R. 1955 M. 785.

91. A.I.R. 1957 Orissa 247.

92. *Veernath v. State of Hyderabad*, A.I.R. 1957 And Pr. 1034.

93. *Karam Singh v. Nihal Khan*,

A.I.R. 1957 All. 549; 1957 All. L.J. 698.

94. *Anand Kumar Bindal v. Employees' State Insurance Corporation*, A.I.R. 1957 All. 136.

95. *Veernath v. State of Hyderabad*, A.I.R. 1957 And Pra. 1034.

Section 3 (2) (b) is not revived because the ban was removed under the Constitution (Fourth Amendment) Act, 1955⁹⁵.

The rights of the reversioner taken away by the Hindu Succession Act is not affected by Art. 31 (2). There is no "public purpose involved" and the acquisition is not by the State⁹⁶.

The question whether a statute at all purports to authorise acquisition or requisition for a public purpose or whether the purpose it mentions or contemplates is a purpose of a public character, and the question whether a particular order made under it is actually supported by a public purpose as contemplated by the Act are both justiciable⁹⁷. If there is a provision which makes the subjective satisfaction of the Government the sole condition precedent to the exercise of the power of acquisition or requisition, it is of no avail against the Court's jurisdiction to judge the existence or otherwise of a public purpose and its character⁹⁸.

The Constitution (Fourth Amendment) Act has no retrospective effect. Therefore, the rights of parties before the amendment would be governed by the unamended Art. 31 (2)⁹⁹.

The leading object of the Madras Estates Land (Reduction of Rent) Act, 1947, is to standardise rents in the State and to bring down the rent payable to a landlord in the estate governed by the Act to the level of rents obtaining in ryotwari tracts. A law regulating the relation of a landlord with the tenant is not one which takes property within the meaning of Art. 31 (2) even though it has the effect of reducing his rights¹⁰⁰. Taking over management and collection of rents by the State will not offend Sec. 299, Government of India Act. This will not amount to confiscation or any substantial deprivation of property. It will in no way affect the title of landholder¹⁰⁰.

In *Surendranath Jana v. State of West Bengal*¹ West Bengal Estates Acquisition Act (1 of 1954) came in for scrutiny. It was held there were ample provisions in the Act and Rules for the payment of compensation by the State for acquiring properties under the Act and the payment was enforceable in Courts of law. The adequacy of such payment is, however, beyond the cognizance of the Courts. There can be no bar to the maintainability of a suit to enforce payment of compensation though Section 58 of the Act contains a prohibition against institution of suits.

The appointment of a treasurer and vesting of the properties in him for the purposes specified in the Charitable Endowments Act would not offend the fundamental rights of the members of a society under Art. 19 or Art. 31 of the Constitution².

Sec. 6 (1) and (3) of the Land Acquisition Act (1894) does not contravene Art. 31 (2) and is further saved by clause (5) (a) of Art. 31 as

96. *Bhabani Prosad Saha v. Shri Sarat Sundan Choudhuri* A.I.R. 1957 Cal. 527.

97. *Satyanarayan Nathani v. State of W. Bengal*, A.I.R. 1957 Cal. 310; 61 C.W.N. 420.

98. *Ibid.*, relies on A.I.R. 1954 S.C. 170; 1954 S.C. J. 95.

99. *Anand Kumar Bindal v. Employees' State Insurance Cor-*

poration, A.I.R. 1957 All. 136.
100. *Venkatachalamayya v. State of Madras*, A.I.R. 1958, And Pra. 173 (F.B.): (1958) 1 An. W.R. 88.

1. 62 Cal. W.N. 14.

2. *P. B. N. C. Committee v. Govt., Andhra Pradesh*, A.I.R. 1958 And Pra. 773.

an "existing law"³. Section 39 of the Saurashtra Land Reforms Act 25 of 1951 was also held *intra vires* of Art. 31⁴. For the land which belonged to Mulgirasia in the Gharkhed lands did not become property of the state after the passing of the Act⁴.

As the Orissa Act XVIII of 1948 though passed within eighteen months from the commencement of the Constitution, was not submitted to the President for his certification as required by clause (6) of Art. 31, the court can examine whether there is public purpose behind the proposed acquisition⁵. In the impugned Act under Sec. 2 (c) the Governor of Orissa was pleased to specify that the project of establishment of a paper mill at a place in Cuttack district shall be included within the meaning of the expression "development of industries" as defined in the section. It was held⁵ that there was "no public purpose" in the proposed acquisition and as such the impugned notification infringed Art. 31 (2).

The public purpose may be stated in the preamble to a statute. Whether it is acquisition or requisition, public purpose is justiciable⁶.

The State legislature is competent to legislate both for public and private religious endowments under item 28 of List III but in the case of private religious endowments there may be a proprietary interest in the beneficiaries and the legislature cannot take away that interest and thereby contravene Art. 19 (1) (f) or Art. 31 (2)⁷. So long as a judicial tribunal is given the ultimate power to decide whether any order of the executive authority which affects the right of property of an individual is justifiable or not, the statutory provision cannot be held to impose an unreasonable restriction on the right of the beneficiaries⁸.

In *G. Nageswara Rao v. A. P. S. R. T. Corporation*⁸ Chapter IV A of the Motor Vehicles Act (1939) as amended by Act 100 of 1956 was impugned as offending Art. 31 (2) in that it provided no compensation to existing permit holders whose permits were cancelled and the business run by state-managed corporation. The Supreme Court rightly held that cancellation of permit was not transfer of business to the Government. Though plying on a prescribed route is business which is property, yet the plying is conditioned by a permit issued under the State's regulatory power under the statute. If the State cancels the permit, then the permit ceases. If the permit is given freshly to another or the State itself takes up the business, it is not a question of transfer of any business. It is the beginning of a new enterprise on a permit. Only when property passes from one to another can compensation be asked. Further in the instant case Art. 19 (6) permits nationalisation of transport. It is manifest from the provisions of the Motor Vehicles Act that the Regional Transport Authority can, in exercise of its regulatory power conferred on it in the interest of the public issue a permit to a person in regard to a stage carriage authorising him to use the same in a particular route for particular period subject to the conditions laid

3. *R. L. Aurora v. State of U.P.*, A.I.R. 1958 All. 872.

4. *J. Habhubha v. State of Bombay*, A.I.R. 1959 Bom. 43.

5. *Satrughna Sahu v. State of Orissa*, A.I.R. 1958 Orissa 187.

6. *Nandeswar Chakravorthy v. State of Assam*, A.I.R. 1958 Assam 140.

7. *Bhim Sen v. State of Orissa* A.I.R. 1959 Orissa 17.

8. *Ibid.* A.I.R. 1954. S.C. 400 relied on.

down in the permit, suspend or cancel the same under specified conditions and renew or refuse to renew the same after the expiry of the period subject to the conditions laid down in the Act. Under Chapter IV A if a scheme has been promulgated empowering the State Transport Undertaking to take in hand the transport service in relation to any area, route or portion thereof to the exclusion of any person who has been carrying on the business in that route the Transport Authority is empowered to cancel the existing permit and issue a permit to the State Transport Undertaking. It cannot be said that if the Transport Authority cancels the permit of a person carrying on his transport business in a route and gives it to another, the process involves a transfer of business or undertaking of the quondam permit-holder to the new entrant⁹.

The Supreme Court, therefore, held that there was no question of compensation and Chapter IV A which was impugned did not offend Art. 31 (2). But in the judgment which was unanimous in the above matter, there was difference of opinion on the question whether the hearing under S. 68 (D) of the Act was quasi-judicial or administrative. The majority opinion expressed by Subba Rao, J., was that it was quasi-judicial while the dissenting judges, Wanchoo, J., and Sinha, J., opined that it was merely administrative¹⁰. [Vide comment under Art. 32 on this aspect.].

In *C. K. Achutan v. State of Kerala*¹⁰ it was held that where a milk contractor who had been supplying milk to the Government hospital was by-passed and the contract was given to the Co-operative Milk Supplies Society, there was no contravention of Art. 14, 16 (1), 19 (1) (G) or 31. That the petitioner's tender was initially approved and later cancelled by the Government does not affect the position. A contract for supply of goods is not a contract of employment. The petitioner's right to trade is not affected nor has he any right to the property of which he is said to have been deprived of. It was only a case for breach of a contract and a possible claim for damages in a civil suit.

ARTICLE 31 CLAUSE (2-A).

COMMENT

Article 31 has now a new clause in (2-A) consequent on the Fourth Constitution Amendment. It states :

“Where a law does not provide for the transfer of the ownership or right to possession of any property to the state or to a corporation owned or controlled by the state, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property”.

The above clause has been necessitated by the decisions in *Subodh Gopal Dwarakdas*² and *Saghir Ahmed*³. The words “taking possession of” in clause (2) is now replaced by the word “requisitioning”. There is now no longer any obligation to pay compensation unless the law does provide for the transfer of ownership, or right to possession of any property to the state or to a corporation owned or controlled by the state. So any deprivation by state Act

9. A.I.R. 1959 S.C. 308.

10. A.I.R. 1959 S.C. 490.

1. *State of West Bengal v. Subodh Gopal*, (1954) S.C. A. 65.

2. *Dwarakdas v. Sholapur Spinning Co.*, (1954) S.C.A. 132.

3. *Saghir Ahmed v. State of U. P.*, (1954) S.C. A. 1218.

short of transfer of ownership calls for no compensation. Thus mere regulation or restriction of the rights of ownership, though it may cause injury to the owner in a substantial manner does not call for compensation.

Total destruction of property by state police action without affecting ownership of property also gives no constitutional guarantee of compensation.

In Chiranjit Lal's case⁴ Mukherjee, J., stated, "Acquisition means the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title may be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing to the former".

This was also the minority view (Das, J.) in Subodh Gopal's case⁵. The Constitution Fourth Amendment Act has merely clarified this view in the new clause (2-A) in Article 31. Mere dominion or control of the property, e.g., possession of Court of Wards, management of a business during a crisis—all these can no longer be deemed to attract Art. 31 (2) anent rights to compensation. Compensation can now be claimed only —

- (1) When there is actual transfer of ownership to the state in the case of an out and out acquisition.
- (2) In the case of requisitioning there must be a transfer of the right to possession.

Substantial deprivation of right to carry on a business, e.g., road transport, consequent on the state taking it over as a monopoly, was considered as sufficient "taking" following American precedents to warrant payment of compensation. That was the view in Subodh Gopal's case⁶ and Dwarakdas' case⁷. The present new clause (2-A) in Art. 31 sets at rest the doctrine of "mere taking". Either full ownership or right to possession at least must pass to the state before any compensation could be demanded as of right. This amendment is expected to speed up the Socialist pattern of society.

Clause (2-A) includes the words "or to a corporation owned or controlled by the state", and hence the benefit of Art. 31 (2) extends also where there is acquisition for purposes of such a corporation.

The Constitution (Fourth Amendment) Act, 1955, removed the cloud over the constitutionality of the Bihar Act (XXX of 1951) — Bihar Koshi Area (Restoration of Lands to Raiyats) Act. This was so after 27th April, 1955. But the Bihar Act was not retrospective with regard to the amendment of Art. 31 (2) and the insertion of the new Art. 31 (2-A). The consequence was that the proceedings taken by the Collector under Sec. 3 of the Act before that day was infected with illegality. This, however, could not be cured by the Constitution Fourth Amendment⁸.

The Allahabad High Court held⁹ that Sec. 14 Cl. (ee) of the Consolidation of Holdings Act, 1953, was *ultra vires* as that Section and the rules thereunder caused the tenure-holder to be deprived of his land for public purposes without compensation⁹. It was, however, held in the same case⁹ that the

4. 1950 S.C.R. 869.

5. *State of W. B. v. Subodh Gopal*, 1954 S.C.R. 587.

6. 1954 S.C.R. 587.

7. 1954 S.C.A. 132.

8. *Sm. Chhayan Devi v. State of Bihar*, A.I.R. 1957 Patna 44: I.L.R. 35 Pat. 847.

9. *Mukhtar Singh v. State of U.P.*, A.I.R. 1957 All. 297.

benefit which might be conferred upon those from whom land was taken away along with other members of the public could be considered to be compensation within the meaning of Article 31. Such a benefit is not one derived in their private capacity⁹.

In the case of abolition of patels and patwaris and their vatandari rights, S. 214 of the Madhya Pradesh Land Revenue Code provided no compensation. Art. 31 as it stood prior to the Fourth Amendment would hit S. 214. But Art. 31 (2-A) being retrospective, saves S. 214 from being unconstitutional¹⁰. By the use of the words "it shall not be deemed to provide for the compulsory acquisition or requisitioning of property" in Art. 31 (2-A) Parliament clearly intended to apply the fiction without reference to any point of time and to make clause (2-A) retrospective in operation.¹⁰

ARTICLE 31 (3).

Clause (3) reads: "No such law as is referred to in clause (2) made by the Legislature shall have effect unless such laws, having been reserved for the consideration of the President, has received his assent".

The analogous provision in the old Government of India Act, 1935, was Sec. 299, Cl. (3) which stated:

"No bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion or in a chamber of a provincial Legislature without the previous sanction of the Governor in his discretion".

Articles 200 and 201 relate to the assent of the Governor or reservation of bill by the Governor for consideration of the President. Art. 201 postulates that the President shall either assent to the Bill or withhold his assent to it. In Art. 31 (3) it is specifically stated that all expropriatory laws passed under Art. 31 (2) shall not be valid unless the Governor of a state sends it for presidential consideration and the latter finally assents to the same.

The word "law" in clause (3) obviously connotes "Bill" before it becomes law. This is, however, a loose phraseology. It is not applicable to a "Bill" which is not passed by the legislature. The question of President's assent arises only after the Bill is passed by the legislature.

If there is no presidential assent the "law" has no legal force. If the Governor assents to it without getting the President's assent, the law will be void.

There is no question of Governor's assent at all. He has merely to reserve it for President's assent. The Governor cannot assent to the Bill under Art. 200 and then reserve for the President's consideration under Art. 31 (3). The opinion expressed to the contrary in a Travancore case is, it is submitted, erroneous¹¹. The Supreme Court has cleared this matter in *Kameshwar's case*¹²

10. *Berar Provincial Patwaris' Association v. State of Bombay*, A.I.R. 1958 Bom. 300: 60 Bom. L.R. 597, relies on A.I.R. 1930 P.C. 54 : A.I.R. 1957 S.C. 509.

11. See *Pandarathil v. Collector*, (1953) 8 D.L.R. 584 (T.C.).

12. *State of Bihar v. Kameshwar*, A.I.R. 1952 S.C. 252.

where it was held Governor's assent was meaningless in cases where it had to be reserved for presidential assent.

In effect Art. 31 (3) provides for compulsory reservation of Bills for the President's assent. Art. 200 (2) also is a similar provision. The article is only prospective and not retrospective.

It is not question of the President giving assent twice over, once under Art. 200 (2) and again under Art. 31 (3)¹³. The reservation for presidential assent is only under Art. 200 when the President is enabled to see if the requirements of Art. 31 (3) are fulfilled¹³. This power of reservation for presidential assent is not formal. There is a good deal of discretion left to the President to refuse his assent if he thinks the Bill is needlessly and violently expropriatory and will affect most adversely vested interest out of all proportion to the necessity of the public purpose envisaged in the Bill. The President can go deeply into the question if the "public purpose" is a real one or a mere cloak for arbitrary expropriation. He can judge if the compensation provided is adequate. The President acts in effect as the safety valve against all hasty or purposeful expropriatory laws. Parliamentary democracy has thus a counter-check in the unitary powers of the President.

The President chosen therefore must need be a person of outstanding capacity and integrity to prove as a healthy safety valve to the idiosyncracies of a parliamentary democracy which is built upon the shifting sands of adult franchise vouchsafed to the millions of citizens economically dependant and educationally backward. In this sense Art. 31 (3) is a salutary provision safeguarding property rights through the counter-check of a presidential assent.

Judicial Interpretation.

In *K. N. Pandarathi v. Dist. Collector, Trivandrum*¹⁴, the Travancore-Cochin Public Safety Measure Act 5 of 1950 was held not to be "Law" within the meaning of Art. 31 (2) since the Act was not reserved for consideration of the President nor his consent obtained. The reservation that has to be made under Cl. (3) of Art. 31 is of a "Law" and not of a Bill as mentioned in Art. 200. So the words "if it has been reserved for the consideration of the President would have received his consent" based on the analogy of Art. 200 cannot be imported into Art. 31 (3). The words used in cl. 3 are "having been reserved for the consideration of the President has received his assent" clearly indicating that there should have been a reservation for the consideration of the President and there must have been his consent. The word "Law" in clauses (2) to (6) in Art. 31 mean only statute law.

In *Ramjidas v. State of Rajasthan*¹⁵ it has been posited that the term 'Legislature of a State' in Art. 31 (3) does not include within its meaning the Government of a State or some other authority while making rules, regulations or orders under authority given to it under a Central Act of Parliament. The meaning of the words 'the State' in Art. 12 has no bearing on the meaning of the words "Legislature of a State" appearing in Art. 31 (3).

In *Amar Singh v. State of Rajasthan*¹⁶ it was pointed out that Art. 31 (3) and the proviso to Art. 31-A (1) speak of the law being reserved for the assent of the President and not of the Bill or the Act. The word "Law" is used in the context as meaning the measure which later becomes the Act. It is not used

13. *Visveshwar Row v. State of Madhya Pradesh* A.I.R. 1952 S.C.R. 1020 (1033).

14. A.I.R. 1954 T.C. 145.

15. A.I.R. 1954 Raj. 97.

16. A.I.R. 1954 Raj. 291.

in the sense of a law passed by the legislature. There would be no sense in the Rajpramukh or the Governor assenting to a Bill and then reserving it for the assent of the President.

In *Kodarp Lakmiah v. State of Hyderabad*¹⁷ Secs. 1 and 3 of the Hyderabad City Improvement Board (Land Acquisition) Act (35 of 1951) was held to be invalid and the authorization of the District Collector to determine questions of compensation was without force as the law was rendered nugatory without the assent of the President of the Republic.

The expression "law" is used in Cl. (3) of Art. 31 and in 31-A somewhat loosely to include even a Bill which has not yet become law by being assented to by the President or Governor, as the case may be^{17a}.

ARTICLE 31 CLAUSE (4).

The exceptions to clause (a) of Art. 31 are to be found in Clauses 4 to 6. The present clause (4) deals with pending Bills in a State legislature (not Union Parliament) relating to acquisition of property by the State, at the time of the commencement of the Constitution. Once such a Bill is passed by the legislature and assented to by the President, it is immune from the "compensation clause" of Art. 31. (2). Instances of such Bills are the Bihar Land Reforms Act XXX of 1950 and the U. P. Zamindari Abolition Act 1 of 1951. But such legislation can be questioned in Court, on the ground of legislative competence¹⁸, and on the ground of whether the purpose is a public purpose¹⁹, or if it offends any other fundamental right such as the guarantee of equal protection in Art. 14 etc.²⁰ There can thus be veto on any law that savours of discrimination in providing different criteria of calculation for compensation for different sets of persons, there being no reasonable basis for such a classification¹⁸.

What is important for this clause is that the Bill must be pending on the date of the commencement of the Constitution. It is not necessary that the Act which emerges from the legislature follows the Bill in every respect²¹. Ordinarily, a court will not traverse facts in an application under Art. 226. The court can go into the question if the purpose stated in the enactment is or is not a public purpose. It will not question, however, if the purpose exists or not. In case an order of requisition does not state the purpose at all, the court can decree if the purpose subsequently stated is a public purpose and if it existed as a fact²².

This clause (4) of Art. 31 is a restriction on the court from entertaining action to enforce any right acquired with effect from the date of the enactment purporting to extinguish them. The clause therefore affects all actions instituted before or after the impugned legislation. The point of importance is not the institution but "the enforcement or recognition" by the Courts²³.

A law covered by Art. 31 Cl. (4) will be considered valid even though it does not comply with the requirement of clause 2. In effect contravention

17. A.I.R. 1955 Hyd. 41.

17a. *Sankarsana Ramanuja v. State of Orissa*, A.I.R. 1957 Orissa 96. A.I.R. 1952 S.C. 252: 1952 S.C. J. 354, 427 and 446 followed.

18. *Kameshwar v. State of Bihar*, A.I.R. 1951 Pat. 91.

19. *Ibid.* (Contrary view in *Surya-pal Singh v. U. P. Govt.* A.I.R.

1951 All. 674).

20. *Ibid.*

21. *Ram Dubey v. Govt. of M. B.*, A.I.R. 1952 M. B. 57.

22. *Nazimuddin v. State* (1952) 7 D.L.R. 170 (172) Bom.

23. *Kameshwar Singh v. Prov. of Bihar*, A.I.R. 1950 Pat. 392 at 399.

of clause (2) is cured by the provision in clause (4)²⁴. But if, say a public purpose or provision of compensation is provided by some law other than Art. 32 (2), clause 4 of Art. 32 cannot protect it. For only when Art. 32 (2) is contravened clause (4) can be invoked but not if the contravention is of some other law.

If there is contravention of cl. (2) of Art. 32 the words "notwithstanding anything in the Constitution" clearly denote that not even any other provision of the Constitution can defeat cl. (2) but that the latter can be controlled only by cl. (4) of Art. 31²⁵. In *Ram Dubey v. Govt. of Madhya Pradesh*²⁶ it was posited, "It would appear from the words 'notwithstanding anything in the Constitution' which occur in clause (4) that it is not permissible to object to any Act on the ground that the compensation in law as being contrary to other provisions of the Constitution. The protection given by clause (4) is not confined to one ground only, namely the ground arising out of the provisions of cl. (2) of Art. 31." In *Surya Pal Singh v. U. P. Government*²⁷ it has been pointed out that if the Constitution says that a certain law shall not be challenged on a particular ground, the result is that the Act cannot be challenged on that ground and has to be treated as valid and enforceable. The object of clause (4) therefore appears to be that a law relating to the compulsory acquisition of property should not be open to question merely on the ground that it does not limit the acquisition to one for public purposes or does not provide for compensation²⁷. The condonation of any such is provided for in clause 4.

Legislative Entries.

The relevant entries are—

1. Entry 33 of List I : Acquisition or requisitioning of property for the purpose of the Union.
2. Entry 36 of List II : Acquisition or requisitioning of property except for the purpose of the Union subject to provisions of Entry 42 of List III .
3. Entry 42 of List III : Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined and the form and the manner in which the compensation is to be given.

It will be seen that these entries do not provide that legislative Acts must contain the compensation clause²⁸. The provision as to compensation is specifically provided in the Constitution itself as a positive enactment unlike Sec. 51 placitum (XXXI) of the Australian Constitution where it is embodied as a positive legislative head specifying the subject of legislation. The legislative entries in Sch. VII of our Constitution do not also bespeak of any legislative purpose. Hence as laid down in *Kameshwar Singh's case*²⁸ the word "acquisition" in the entries of Legislative Lists cannot by itself import the public purpose. It is clause (2) of Art. 31 that enjoins the need for a public purpose or compensation. Legislative competence as such is not affected by the absence of a public purpose or a compensation clause. It would appear

24. *Govinda v. State of Uttar Pradesh*, A.I.R. 1952 All. 88, follows A.I.R. 1951 All. 674 (F.B.).
25. *State of Bihar v. Kameshwar*

Singh, A.I.R. 1952 S.C. 252.
26. A.I.R. 1954 Madh. B. 57.

27. A.I.R. 1951 All. 674.

28. *State of Bihar v. Kameshwar Singh*, A.I.R. 1952 S.C. 252.

from the description of the entries in the three Lists, that while the Union List I blandly mentions acquisition or requisitioning of property for purposes of the Union, in Lists II and III we have it subjected to Entry 42 of List III which speaks of principles of compensation, purpose of the Union or for any other public purpose. Thus there can be a law at the Union level of mere acquisition or requisitioning fulfilling the first clause of Art. 31. At the Concurrent and State levels clause 2 of Art. 31 comes into play.

Article 31 cl. (2) enjoins compensation to be just and fair. Hence an objection to the validity of such a law on the basis that the compensation provided is not just and fair is also barred under the provision in clause (4) of Art. 31²⁹. Hence in effect Art. 31 (4) bars all objections as to the adequacy or correctness of principles in respect of compensation.³⁰ Legislative competence may be objected to. Article 31 clause (4) saves the impugned law only from clause (2) of Art. 31 but does not exempt it from the operation of other provisions of the Constitution such as Articles 14, 19, etc³¹.

Article 31-A and clause (4) of Art. 31.

While clause (4) of Art. 31 exempts a law from the operation of Art. 31 cl. (2), Article 31-A exempts the law from the operation of "any" fundamental right. But while Art. 31-A is confined to "estates" and rights therein, Art. 31 (4) is not so confined but is general in its terms³¹. The *nonobstante* clause "Notwithstanding anything in the Constitution" is found only in clause (4). It is absent in Art. 31-A. While cl. (4) applies only to pending Bills in the legislature at the commencement of the Constitution, Art. 31-A is not so limited³¹.

Clauses (3) and (4) of Art. 31.

Under clause (3) it is necessary to get the President's assent for all State laws relating to compulsory acquisitions of property to make the law valid. Such an assent is required for the validity of a law under clause (4) in respect of a pending Bill in a State legislature at the commencement of the Constitution. The effect of the two clauses (3) and (4) therefore amounts to this, namely, that the President's assent must first be obtained under cl. (3) and once again under clause (4) if it has to override the provisions of clause (2) of Art. 31³¹.

Judicial Interpretation.

In *Kameshwar Singh v. State of India*³², the Patna High Court has observed that Art. 31 (4) does not, however, endow in terms a power on the President. What it does is to take away a right of action from the citizen. There is nothing in Art. 31 (4) to suggest that the Constituent Assembly intended that in a scheme of land reforms involving the payment of compensation this basic principle might be completely ignored. The Bihar Act XXX of 1950 is an unconstitutional law enacted in the belief that the right of the landholders to challenge it and ask for relief from its operation has been taken away. Reuben and Dass, JJ., felt that though the assent of the President protected the Act from challenge on the ground that it contravened Art. 31 (2), yet it did not

29. *Gajapati Narayan Deo v. State of Orissa* A.I.R. 1953 S.C. 375.

30. *Kameshwar Singh v. State of Bihar*, A.I.R. 1951 Pat. 91.

31. *State of Bihar v. Kameshwar*

Singh, A.I.R. 1952 S.C. 252.
32. A.I.R. 1952 Pat. 91 (S.B.).
For appeal see 1952 S.C.J. 354.

protect the Act from attack on any ground not arising under Art. 31 (2). In the Supreme Court in the instant case³³, Patanjali Sastri, C.J., and Das, J., held that Art. 31 (4) debarred the challenge of the constitutionality of the Act both as regards the question of compensation and also regarding the public purpose. But Mahajan and Chandrasekhara Iyer, JJ., held that the protection afforded by Art. 31 (4) extended only to the contraventions of the provision to compensation and that the clause did not debar the court from enquiring whether the acquisition of the estates under the Act was for any public purpose. Mukherjee, J., opined that the instant case could not be called unconstitutional simply because there was not public purpose disclosed in it. For the requirement of public purpose is implicit in compulsory acquisition of property by the state or what is called the exercise of its power of *Eminent Domain*.

In *Mohammad Raza Ali Khan v. State of Uttar Pradesh*³⁴, it has been held that notwithstanding anything to the contrary, the Bill having reserved at the commencement of the Constitution and having been passed and assented to by the President is not liable to be questioned in any court on the ground that it contravenes the provisions of Art. 31 (2). The Supreme Court in *K. C. G. Narayan Deo v. State of Orissa*³⁵ has upheld the Orissa Estates Abolition Act 1 of 1952 as valid; that there is nothing in the law which prevents the State legislature from providing as part of the estates abolition scheme that buildings lying within the ambit of an estate and used primarily for management or administration of the estate, would vest in the Government as appurtenances to the estate itself. Even if the compensation provided for the acquisition of the buildings in Sec. 26 (2) (iii) of the Act is not just and proper Art. 31 (4) provides the complete answer to such accusation. Further, for the application of Art. 31 (4) it is not necessary that the Bill has got to be passed in its original shape without any change whatsoever. The words "passed by such Legislature" must mean "passed with or without amendment" in accordance with the normal procedure contemplated by Art. 107 of the Constitution.

A pending Bill cannot be said to have lapsed merely because of the prorogation of the House or Houses of Parliament so as to attract Art. 31 (4)³⁶. In a Madhya Bharat case³⁷ it was posited that the existence of a public purpose as a condition precedent to the exercise of the power of compulsory acquisition being a provision of Art. 31 (2) an infringement of such a provision could not under Art. 31 (4) be put forward as a ground for questioning the validity of the Act. This follows the Supreme Court decision in Kameshwar Singh's case³⁸ where Mukherjee, J., held that Art. 31 (4) did not do away with the obligation to pay compensation. It merely laid down that the laws which were referred to in cl. (3) of the Article would be immune from judicial scrutiny on the ground of inadequacy of the amount of compensation or the impropriety of the principle for assessing the same as provided for in the enactment. Patanjali Sastri, C.J., and Das, J., felt that Art. 31 (4) debarred the challenge of constitutionality of the Act as regards the adequacy of compensation and also regarding the public purpose. Art. 31 (4) presupposed that the questioned enactment was the result of a valid exercise of a legislative power conferred on the legislature by the appropriate entries in the legislative lists and if the

33. *State of Bihar v. Sir Kameshwar Singh*, A.I.R. 1952 S.C. 252; (1952) S.C.R. 889; 1952 S.C.J. 354.

34. A.I.R. 1953 All. 92.

35. A.I.R. 1953 S.C. 375 in appeal from A.I.R. 1952 Orissa 185.

36. *Raja Surya Pal Singh v. State of U. P.* (1952) S.C.R. 1056.

37. *Raj Rajendra Maloji Rao Shitole v. State of M. B.*, A.I.R. 1953 M.B. 97.

38. *State of Bihar v. Kameshwar Singh*, A.I.R. 1952 S.C. 252.

legislature acted outside these entries or under the pretence of acting within them did something which was in flat contradiction with its contents, cl. 4 of Art. 31 could not be invoked to afford protection to such legislation³⁹.

In *K. C. Narayan Deo v. State of Orissa*⁴⁰ it has been posited that Art. 31 (4) is not limited to the Bill as it stood but will also extend to normal amendments which a bill ordinarily undergoes in the course of its passage through the legislature. But it may be different if in the course of that passage, the structure of the Bill itself in any of its essential features has been totally altered. It has been further pointed out that so far as the cases which fall within the scope of Art. 31 (4), 31-A or 31-B are concerned, the law relating to compulsory acquisition is not open to challenge on the ground that the scheme of compensation provided by it, does not conform to what are said to be the accepted attributes of compensation which in this behalf is alleged to mean "just compensation" and in that sense only, provides no compensation.

The Supreme Court has posited in *Raja Jagaveera Rama M. Venkateshwar Ettappur, Zamindar of Ettayapuram v. State of Madras*⁴¹ that the existence of a public purpose behind the acquisition of the items of property mentioned in any Zamindari Abolition Act is not a justiciable issue in case of an enactment which having fulfilled the requirements of clause (4) of Art. 31 enjoys the protection afforded by it. It has been further posited that List 3 of Sch. 7 Entry 42 is undoubtedly the description of a legislative head and in deciding the competency of a legislation under this entry, the court is not concerned with the justice or propriety of the principles upon which the determination of the compensation is to be made or the form or manner in which it is to be given. But even then, the legislation must rest upon some principle of giving compensation and not of denying or withholding of it and a legislation cannot be supported which is based upon something which is non-existent or is unrelated to facts and consequently cannot have a conceivable bearing on any principle of compensation. It has been further held that the principles set out in A.I.R. 1952 S.C. 252 are not applicable to the present case as in former case the Bihar Land Reforms Act is protected under clause 4 of Art. 31. The impugned Act in the present case was the Madras Estates (Abolition and Conversion into Rayotwari) Act 26 of 1946 passed by the Madras legislature functioning under the Government of India Act, 1935. In the latter there is no corresponding entry to Entry 42 List III of the Constitution. The only relevant entry under the 1935 Act was item 9 of the List II which spoke of merely "compulsory acquisition of land" and it is clear that a duty to pay compensation or of laying down any principle regarding it was not inherent in the language of that entry.

There does not seem to be any justification for reading in Art. 31 (4) that the Bill must be in the House or Houses of the Legislature and should not have reached the Governor⁴². If it was in the hands of the Governor who was an integral part of the Legislature, it would still be deemed to be in the Legislature of a State. It is only after the Governor has dealt with it finally under Art. 200,

39. *Ibid.* per Mukerjee, J.

40. A.I.R. 1953 Orissa 185.

41. A.I.R. 1954 S.C. 257, follows A.I.R. 1953 S.C. 375. See *Shahzad Khan v. Jhallu Singh*,

A.I.R. 1955 M.B. 146.

42. *Raja Bhariabendra Narayan Bhup v. State of Assam*, I.L.R. (1956) 8 Assam 379 (F.B.).

that it may be said to have gone out of the hands of the Legislature of the State.

ARTICLE 31 CLAUSE (5).

This clause provides the exceptions to the application of clause (2) of Art. 31. Thus Art. 31 (2) cannot apply to :—

1. the provisions of any existing law other than a law to which Art. 31 (6) applies. The latter stipulates that laws enacted more than eighteen months before the commencement of the Constitution shall not be affected by Art. 31 (2);
- 2(a) the provision of any future statute law of taxation or penalty; or
- (b) law for promotion of public health or prevention of danger to life or property; or
- (c) law which is the result of agreement between the Government of India and any other country with reference to evacuee property (so declared by law) e.g., Evacuee Property Act, XXXI of 1950.

In respect of the above categories of laws, as Art. 31 (2) is not applicable the courts shall have no power to examine their validity on the ground of want of provision for compensation. The reasoning by the majority judgment in *State of Bihar v. Kameshwar*⁴³ that Art. 31 (4) does not debar the court from questioning if a law coming within that clause is made for a "public purpose" and that all that is precluded is compensation—this is equally the case when we consider Art. 31 Cl. (5) and Cl. (6).

The exempted Acts under the rule of eighteen months can be cited in such Acts as the Bombay Land Requisition Act (XXIII of 1948); the Essential Supplies Act (XXIV of 1946)⁴⁴; the Requisition Land (Continuance Powers) Act (XVII of 1947)⁴⁵; West Bengal Premises Requisition and Control Act (V of 1947)⁴⁶; the Bombay Land Requisition Act, 1948⁴⁷, the Travancore-Cochin Salt Act 1088 M. E.⁴⁸, the Bengal Food Grains (Disposal and Acquisition) Order, 1947.

"Prevention of danger to life or property" is one of the categories under which if a law is passed the protection of Art. 31 cl. (5) can be invoked against the rule enunciated in Art. 31 (2), namely, "compensation". It has to be remembered that "compensation" to individual members of a community rests on the doctrine of *Eminent Domain* which in effect is founded on the principle of benefit to the members of the community. What is adumbrated in clause (5) is somewhat similar to the American concept of the police power of the state which rests on the principle of necessity of protection of the community from public evils⁴⁹.

"Existing Law".

The words "existing law" has been defined in Art. 366 cl. (10) as "any law ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any legislature, authority or person

43. A.I.R. 1952 S.C. 252.

44. *Gobinda v. Dinesh*, (1951) 56 C.W.N. 137; A.I.R. 1952 Cal. 100. *Indra v. State of West Bengal*, A.I.R. 1952 Cal. 61.

45. *Krishna v. Director of Lands*, (1952) 56 C.W.N. 306.

46. *Sudhindra v. Sailendra*, A.I.R.

1952 Cal. 65.

47. *State of Bombay v. Heman Santal*, A.I.R. 1952 Bom. 16.

48. *Mansoor v. T. C. Govt.*, A.I.R. 1952 T.C. 14.

49. See *Northern Pacific Ry. v. N. Dakota*, (1915) 236 U.S. 585 (595).

having power to make such a law, ordinance, order, bye-laws, rule or regulation". In Art. 13 (3) the term "law in force" occurs.

"Law in Force" vis-a-vis "Existing Law".

In Heman Santal's case⁵⁰ it has been posited that the expression "existing law" is a term of wider concept than "law in force" and not *vice versa*. "Existing law" includes whether actually in force or potentially in operation. The only qualification laid down by the Constitution is that these laws must have been passed before the Constitution came into force. "Law in force" has a narrower and non-restricted connotation. It seems to indicate laws actually in force, not laws whose operation is suspended or which have not been extended to certain territories. Because its connotation is narrow and restricted, the Constitution had to give to it an extended meaning both in Art. 13 and in Art. 372 by including in the expression "Law in force" any law or any part thereof which may not be in operation at the date of the commencement of the Constitution at all or in particular cases. But Chagla, C.J., in the instant case was not inclined to give such an extended meaning. He opined, "The Constitution might have used the same expression 'existing law' in Arts. 13 and 372. The ways of draftsmen like those of providence are often inscrutable".

In order that the law should be an "existing law" the only qualification laid down by the Constitution is that it should have been passed before the commencement of the Constitution. In Art. 19 also where the term "existing law" is used, it is indicative of the fact that the restriction of fundamental right is not only with regard to the saving of existing law but also with regard to any future law that the state might make⁵⁰.

Clauses (5) and (6).

It is not every "existing law" that is exempted from the operation of clause (2). One of the exceptions is covered by Art. 31 cl. (6). The latter applies to laws which have been passed within eighteen months before the coming into force of the Constitution. Hence a law passed within eighteen months before the Constitution came into force is not exempt from Art. 31 cl. (2) on account of Art. 31 cl. (5) (a) though it may be an "existing law". Even the latter laws will be exempt from cl. (2) by virtue of Art. 31 (6) if they are certified by the President. The protection of clause (5) is not limited to "compensation" but also the "public purpose" clause⁵⁰.

Other than "law to which clause (6) will apply".

Art. 31 cl. (5) refers to the provisions of any existing law "other than a law to which the provisions of cl. (6) will apply". This only refers to a law enacted not more than eighteen months before the Constitution commenced. The President's certificate does not make it "a law to which clause (6) applies". The non-obtaining of the certificate will only mean that the law will not be entitled to the protection of clause (6) and hence it will be void if it contravened the provisions of clause (2).

Clause (5) (b).

This clause lists out three categories. Any law hereafter to be enacted—

- (1) for purpose of imposing tax or penalty [clause (5) (b) (i)];

50. *State of Bombay v. Heman Santal*, A.I.R. 1952 Bom. 16.

- (2) for promotion of public health or prevention of danger to life or property [clause (5) (b) (ii)];
- (3) in respect of evacuee property pursuant to agreement with foreign countries [clause (5) (b) (iii)].

These three kinds of laws are exempt from the operation of clause (2) by virtue of clause (5) (b).

It may be noted taxation is not deprivation of property. If collection of taxes amounted to deprivation of property within the meaning of Art. 31 (1), then there was no need to have a provision separately in Art. 265 as a redundant clause. In fact in the Government of India Act. 1935, there was no analogous provision to Art. 265. The Constitution has thus treated taxation as a distinct matter⁵¹.

The words "any agreement" and the mention of "the Government of any other country" in clause 5 (iii) were held wide enough to include within the scope of the first part of the sub-clause an agreement between India and any country other than Pakistan also, and there is nothing which restricts such an agreement to the subject of evacuee property⁵².

Judicial Interpretation.

In *Abdul Majeed v. P. R. Nayak*⁵³ it has been posited that the mere fact that under the Administration of Evacuee Property Ordinance (1949) no one has the beneficial use of the property of the evacuee and the property merely remains vested in the Custodian should not deter the High Court from coming to the conclusion that the property is taken possession of within the meaning of Art. 31 (2) and by reason of cl. (5) no obligation attaches to the State to pay compensation for taking possession of that property. The term "existing law" was explained in *State of Bombay v. Heman Santa*⁵⁴ as connoting only that the law should have been passed before the commencement of the Constitution. Any extended period given to a statute does not make it a new Act but denotes only the law already in existence but now extended in its potential future operational period. In the instant case, it was found there was no public purpose disclosed and so inasmuch as the power of requisitioning vested in Government was not restricted to public purpose, even then the Act would not be void as the contravention is permissible under Art. 31 (5) (a).

In *Dwarakdas Shrinivas v. Sholapur Spinning and Weaving Co.*⁵⁵, Patanjali Sastri, C.J., has reiterated his view on Arts. 19 and 31 as expressed in A.I.R. 1954 S.C. 92⁵⁶ and added the impugned ordinance in the instant case authorizes in effect a deprivation of property of the Company within the meaning of Art. 31 without compensation and is not covered by the exception in Art. 31 Cl. (5) (ii). The saving clause (5) comprehensively includes within its ambit all powers of the state in exercise of which it can deprive a person of property without payment of compensation. All forms of deprivation of property by the state without payment of compensation have been included within the ambit of the exception clause, while other forms of deprivation which are outside the ambit of the exception clause are inevitably within

51. *Ramji Lal v. Income Tax Officer, Mohindargarh*, A.I.R. 1951 S.C. 97.

52. *Dhirajlal Vithalji v. Dy. Custodian of Evacuee Property, Mangalore*, A.I.R. 1955 Mad.

53. A.I.R. 1951 Bom. 440.

54. A.I.R. 1952 Bom. 16: 53 Bom. L.R. 355.

55. A.I.R. 1954 S.C. 119.

56. *State of West Bengal v. Subodh Gopal Bose*.

the mischief of clause (2) of Art. 31. The article read as a whole comprehensively defines the state's power of *Eminent Domain* as distinguished from all its other powers, the exercise of which may amount to taking of private property. The argument that exceptions in clause (5) were incorporated in Art. 31 by way of abundant caution further stands negated by the contents of sub-clause (5) (b) (ii) of the Article.

The Supreme Court has held in *State of West Bengal v. Mrs. Bella Banerjee*⁵⁷ that Article 31 (6) is intended to save a State law enacted within eighteen months before the commencement of the Constitution provided the same is certified by the President, while Art. 31 (5) saves all existing laws passed more than eighteen months before the commencement of the Constitution. Reading the two provisions together the intention is clear that an existing law passed within eighteen months before January 26, 1950, is not to be saved unless it is submitted to the President within three months from such date for his certification and is certified by him.

The West Bengal Act 5 of 1947 was held to be *intra vires* in a Calcutta case inasmuch as it was passed beyond the stipulated eighteen months and was therefore an "existing law" within the meaning of Art. 31 (5)⁵⁸. Similarly, the Punjab Pre-emption Act 1 of 1913 was considered as an "existing law" within the meaning of Art. 31⁵⁹.

The Administration of Evacuee Property Act (1950) Section 17 (2) does not infringe Art. 31 as it is saved by Art. 31 (5) (b) (iii)⁶⁰. The result of setting aside a court sale of Evacuee Property under S. 17 (2) is to enable the state to take possession of the property. Clause (2) of Art. 31 calls for existence of a public purpose and the obligation to pay just compensation. The exceptions in clause (5) will, therefore, apply to the element of public purpose as well⁶⁰.

The Bihar Maintenance of Public Order Act, 1949 was held as not saved by Art. 31 (5) as there was no certificate of the President under Art. 31 (b), thereby infringing Art. 31 (2)⁶¹.

If property is declared by law to be evacuee property any legislation relating to that property is saved from the operation of clause (2) of Art. 31 but the Constitution nowhere sets out that property is or can be declared by law to be evacuee property. The latter term is nowhere defined in the Constitution⁶². The term "law" includes also delegated legislation. The expression "property declared by law to be evacuee property" includes property which is declared by notification issued by the Custodian under the Administration of Evacuee Property Act to be evacuee property⁶².

It has been held⁶³ that as the life of the West Bengal Premises Requisition and Control (Temporary Provisions) Act has been extended after the

57. A.I.R. 1954 S.C. 170.

58. *Srinivas Kedwal v. State of West Bengal*, A.I.R. 1954 Cal. 171.

59. *Bhag Singh v. Kartara*, A.I.R. 1954 Pepsu 181. See also A.I.R. 1951 Bom. 440.

60. *Mrs. Mohan Kaur v. Custodian, M. E. P.*, A.I.R. 1956 Pepsu 58; C.L.R. 1956 Pepsu 42 (D.B.).

61. *Ajablal Mandal v. State of Bihar*, A.I.R. 1956 Pat. 137:

C.L.R. 1956 Pat. 57.

62. *Shree Ambarnath Mills Corporation v. D. B. Godbole*, A.I.R. 1957 Bombay. 119: 59 Bom. L.R. 309.

63. *S. C. Satya Narayan Nathani v. State of West Bengal*, A.I.R. 1957 Cal. 310: 61 C.W.N. 420. Relies on A.I.R. 1955 S.C. 41. Dissents from A.I.R. 1954 Cal. 171. A.I.R. 1952 Bom. 16 not approved.

Constitution by the W.B. Act (XV of 1950) it is not an "existing Act" within the meaning of Art. 31 (5) but an Act to which Art. 31 (2) applied.

The nature of the special contribution payable by an employee under Chapter V-A of Employees' State Insurance Act was held to be a tax⁶⁴. But the employer's special contribution was considered a compulsory exaction, recoverable in the event of non-payment as if it were an arrears of land revenue. As it is levied by public authority and is in furtherance of the directive principles declared in Arts. 39 cl. (e), 41 and 42, it is clearly for public purpose and is not payment for services rendered⁶⁴.

The Land Acquisition Act is an existing law within the meaning of Art. 366 (10) and is hence saved by Art. 31 (4) (5)⁶⁵. Even if it does provide for the acquisition for non-public purposes or does not provide for payment of compensation it is not hit by Art. 31 (2)⁶⁵.

ARTICLE 31 CLAUSE (6).

This clause provides that if a pre-Constitution statute has been enacted (1) within eighteen months before 26th Jan., 1950 and (2) it was submitted for the President's certification by 26th April, 1950, and was so certified, such a statute cannot be questioned in any court on the ground of contravention of cl. (2) of Art. 31 or of S. 299 (2) of the Government of India Act of 1935.

To apply clause (6) of Art. 31, both the above conditions should be satisfied to invoke the protection thereof⁶⁶.

It will be seen clause (4) of Art. 31 applies to Bills pending in the State legislature at the time of the commencement of the Constitution while this clause (6) pertains to Bills enacted by the State within eighteen months of the commencement of the Constitution. If clauses (5) and (6) of Art. 31 are read together it will be clear that cl. (b) does not apply to (i) existing laws enacted more than eighteen months before the commencement of the Constitution (ii) and to "existing laws" enacted within eighteen months before the commencement of the Constitution and certified by the President under Art. 31 (b). What is affected under clause (6) are only those statutes within the eighteen-month rule and not certified by the President⁶⁷.

The President's certification must be made known to the public by public notification. The President wields absolute discretionary powers to give or withhold his certificate. He would naturally and generally under Art. 31 consider if there is a public purpose or if there is adequate compensation provided. But in the case of Bill coming under Art. 31 clauses 4 to 6, the President will doubtless give effect to the provisions in those clauses. It must be added that in effect the President's certification powers is the safety valve against hasty expropriatory legislation. This is absolutely necessary since the fashion among ardent politicians even outside the communistic fold is to herald reformist legislation in a bunch without much thought bestowed on the principles underlying the same or the beneficial effects of the same on society or the hardship they may cause to lawful and justful vested interests.

64. *Anand Kumar Bindal v. Employees' State Insurance Corpn.*, A.I.R. 1957 All. 136.

65. *Aurora Ram Ditta Mal v. State of Uttar Pradesh*, A.I.R. 1958 All. 126.

66. *West Bengal Co-op., Society v. Mrs. Bella*, A.I.R. 1951 Cal. 111.

67. *State of West Bengal v. Mrs. Bella Banerjee*, A.I.R. 1954 S.C. 170.

The Bar of Court's jurisdiction under clause (6) is only in respect of compensation and does not extend to other matters such as legislative competency, contravention of a fundamental right, say Art. 19 (1) (f) and the absence of a public purpose. The terms of Art. 31 (6) do not cover every contravention of the Constitution except those in Art. 31 clause (2). Hence in *Kameshwar Singh's case*⁶⁸ it has been held that as the impugned Act was inconsistent with Art. 19 (1) (f) it is void notwithstanding the certification of the President. So the words "any law of the State" connote in clause (6) any valid law of the State.

The President has to publicly notify under Art. 31 clause (6), his certificate to the statutes which can claim protection under clause (6). If there is no such notification clause (6) does not get attracted. The following are some of the notifications under which the President has extended his certificate to the Acts in question under Art. 31 (6) :—

1. Notification dated 11th March, 1950—

Bihar State Management of Estates (Bihar Act XXI of 1949)⁶⁸.

2. Notification dated 12th April, 1950—

Madras Estates Act (Madras Act XXVI of 1948).

Madras Estates Amendment Act (Madras Act 1 of 1950).

Madras Electric Supply (Undertaking Acquisition) Act (XLIII of 1949).

Assam Management of Estates Act (Assam Act XVII of 1949).

East Punjab Displaced Persons Act (E.P. Act XXVI of 1949).

3. Notification dated 29th April, 1950—

Delhi Hotels (Control of Accommodation) Act (XXIV of 1949).

Reserve Bank (Transfer of Public Ownership) Act (XLII of 1948).

Assam Requisition and Control of Vehicles Act, 1948.

Bombay Acts 67 of 1948, 61 and 63 of 1949.

It is not open to courts to question the propriety of the President's certificate though the President has to give his assent only according to well-considered principles. But these are only guiding moral principles and not legally justifiable⁶⁸.

The words 'any law of the State' mean any act, ordinance, or order enacted by the State without reference to its validity⁶⁹. So there is no question of a valid law in existence before the President's assent is given.

The provision in clause (6) is couched in its language and form so as to refer to the future. Nevertheless, the clause has been construed as having a retrospective effect also and can operate as a bar to questioning of the validity of an Act on the grounds mentioned therein, despite the fact that the legal proceeding in which the validity of the Act is challenged was instituted before the birth of the Constitution⁷⁰.

68. *Kameshwar Singh v. Province of Bihar* A.I.R. 1950 Pat. 392.

69. *Veerappa Chettiar v. State of*

Madras, (1952) 1 M.L.J. 456.

70. *Kameshwar Singh v. Province of Bihar*, A.I.R. 1950 Pat. 392.

The Meaning of "Existing Law" with reference to Art. 31 Clauses (5) and (6).

The general rule in Art. 31 (2) is subject to the provisions of Art. 31 Clauses (5) and (6). In *H. P. Khandewal v. State of U. P.*⁷¹ it was pointed out that Art. 31 (2) has no application to a law made more than eighteen months before the Constitution provided it is an "existing law", whereas a law enacted within that period, provided it is certified by the President, cannot be called in question even if either it contravenes provisions of Art. 31 (2) or Sec. 299 of the Government of India Act 1935. Clause (6) of Art. 31 therefore embraces two categories of law, namely certain laws which upon being certified by the President cannot be challenged on the ground that they contravene the provisions of Art. 31 (2) and also certain other laws which upon certification cannot be challenged on the ground that they contravene the provisions of Sec. 299 (2). There is nothing in clause (6) to show that both categories must be "existing Law". The phrase used in clause (5) (a), "existing law other than a law to which the provisions of clause (6) apply" does not mean that the law to which clause "6" applies must be "existing law". The phrase should and can without any straining of the language, be construed to mean any of those laws for which provision is made in clause (6) which came into the category of existing laws. There is, therefore, no reason to hold that the context requires a special meaning to be given to the expression "existing law" as used in Art. 31 (5) (a). The expression must be given the meaning assigned to it in Art. 366 (10) as "any law, ordinance, order, bye-law or regulation passed or made before the commencement of the Constitution by any legislature, authority or person having power to make such law, ordinance, order, bye-law, rule or regulation".

In a Patna case it has been held that the Bihar Maintenance of Public Order Act, 1949, is not saved by the provision contained in Article 31 (5) as there is no certificate of the President under Art. 31 (6) thereby infringing the provisions of Article 31 (2)⁷².

Judicial Interpretation.

In *Kameshwar v. Prov. of Bihar*⁷³ it has been held that the words "any law of the State" in clause (6) mean a valid law. The certificate of the President cannot obviously cure a law which is nullity or void *ab initio* on account of legislative incompetence, want of the public purpose, or affecting other fundamental rights outside the scope of Art. 31 cl. (2). The certificate of the President may cure an irregularity or illegality in some details of the law in a valid piece of legislation but cannot cure a law which is *ab initio* void. The word "law" must mean "valid law". The word used is "Law" and not "Act". In *Norton v. Shelby County*⁷⁴ the Supreme Court of the U.S.A. observed, "An unconstitutional Act is not a law; it confers no rights, it imposes no duties, it affords no protection; it creates no office, it is in legal contemplation as inoperative as though it had never been passed".

The earlier quoted view of Sinha, J., in the Bihar case⁷³ was not approved in *A. L. V. R. S. T. Veerappa Chetty v. State of Madras*⁷⁵ where Rajamannar, C.J., said, "I am clearly of the opinion that the words 'any law of the State'

71. A.I.R. 1955 All. 12.

72. *Ajablal Mandal v. State of Bihar*, A.I.R. 1956 Pat. 137.

73. A.I.R. 1950 Pat. 392 (417, 419

and 431).

74. (1885) 118 U.S. 178 at 186.

75. A.I.R. 1952 Mad. 835.

mean any Act, ordinance, or order enacted by the State without reference to its validity. Of course, this does not mean that it is not open to challenge the validity of the Act on other grounds. Art. 31 (6) does not say that the Act shall not be called in question on any ground whatever. On the other hand, that clause expressly limits the effect of the certificate to the only ground that it contravenes clause (2) of Art. 31 or sub-sec. 2 of Sec. 299 of the Government of India Act, 1935". Rajamannar, C.J., was inclined to accept the view of Das, J., in the Bihar case quoted above to the effect, "A law passed by a competent legislature is valid unless it is declared invalid by a competent court of law. If the court cannot call into question on a particular ground, the ground cannot be urged for its invalidity either at the inception or at a subsequent stage for to do so would nullify provision of Art. 31 (6) of the Constitution".

It is permissible to point out that all that was meant by Sinha, J., was that if the Act was an invalid law, even outside the scope of Art. 31 (6) and Art. 31 (2) mere certification under Art. 31 (6) cannot cure such an invalid law. An "Act" gets the sanctity of law if it is valid. The moment at which the court declares it invalid is not the starting point of its invalidity. In effect it is an "Act" *ab initio* void and the court's recognition of its invalidity only gives the seal of judicial scrutiny.

In *Sudhindra Nath Datta v. Sailendra Nath Mitra*⁷⁶ Art. 31 cl. (6) was applied to the West Bengal Premises Regulation and Control (Temporary Provisions) Act V of 1947. The absence of the provision for compensation is immaterial as the act comes within the purview of clause (6) of Art. 31.

In *State of West Bengal v. Mrs. Bella Banerjee*⁷⁷ the Supreme Court said, "Reading the two clauses (5) and (6) of Art. 31 together, the intention is clear that an existing law passed within eighteen months before 26th January, 1950 is not to be saved unless it was submitted to the President within three months from such date for his certification and was certified by him. The provision in Sec. 8 of the W.B. Land Development and Planning Act, relating to the conclusiveness of the declaration of Government as to the nature of the purpose of the acquisition held is unconstitutional and is not saved by Art. 31 (5)".

In *Sarwarlal v. State of Hyderabad*⁷⁸ it has been held that the certification of cl. (6) of Art. 31 is no better than the assent to a measure under Art. 31 cl. (4). The certification under clause (6) should also only bar the courts from enquiring into questions of compensation which are guaranteed by clause (2) of Art. 31. Thus the enquiry is still open in respect of "public purpose" even in a case covered by Art. 31 clause (6) or (4).

The Supreme Court has held in *A. L. V. R. S. T. Veerappa Chettiar v. State of Madras*⁷⁹ that it is not open to a holder of Zamindari estate in the State of Madras to raise the contention that the provisions relating to compensation as contained in the Madras Act 26 of 1948 are invalid on the ground that they are colourable exercise of legislative powers under the Government of India Act, 1935. The reason is that there is no entry in any of the legislative lists in the Government of India Act, 1935, corresponding to Entry 42 of List III of Sch. VII in the present Constitution

76. A.I.R. 1952 Cal. 65.

77. A.I.R. 1954 S.C. 170.

78. A.I.R. 1954 Hyd. 227.

79. A.I.R. 1954 S.C. 605, follows
A.I.R. 1954 S.C. 257.

and the guarantee given by Sec. 299 (2) of the Act of 1935 is not available to the appellant by reason of Art. 31 (6). This is so even in respect of the contention that absolutely no compensation has been allowed in respect of a large number of under-tenures.

The Orissa Act, 18 of 1948 (Orissa Development of Industries, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced Persons) (Land Acquisition Act) comes within the operation of Art. 31 clause (6) as the first proviso to Sec. 7 (1) (e) of the Act was enacted not more than eighteen months before the commencement of the Constitution. The Act did not receive the certificate of the President as contemplated under clause (6). This enables constitutionality, compensation etc., to be open to attack⁸⁰.

The Saurashtra Grants (Resumption) Ordinance LXXXIV of 1949 and the Amending Ordinance VI of 1950 were *intra vires* since the certificate of the President under Art. 31 (6) was there and there was nothing in them that contravened Art. 31 (2)⁸¹. But the Bihar Maintenance of Public Order Act, 1949, was struck down for want of such a certificate⁸².

Article 31-A.—(1) Notwithstanding anything contained in article 13, no law providing for—

Saving of laws providing for acquisition of estates, etc.

(a) the acquisition by the State of any estate or of any rights therein of the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretariats and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31 :

[Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.]

(2) In this article,—

80. *State of Orissa v. Bharat Chandra Nayak*, A.I.R. 1955 Orissa 97.

81. *Sm. Saw Indumati v. State of*

Saurashtra, A.I.R. 1956 Sau. 32; C.L.R. 1956 Sau. 24.

82. *Ajablal Mandal v. State of Bihar*, A.I.R. 1956 Pat. 137.

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant [and in the States of Madras and (Kerala), any *janmam* right];

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder [*raiyyat*, *underraiyyat*] or other intermediary and any rights or privileges in respect of land revenue.]

COMMENTARY

Articles 31-A and 31-B have been the result of the First Constitution Amendment Act, 1951, which stated in section 4:—

"Insertion of new article 31-A—After Article 31 of the Constitution the following article shall be inserted and shall be deemed always to have been inserted, namely—....".

The object of the amendment was to give validation to the acquisition of Zamindaris or the abolition of the permanent settlement without interference from Courts. Patanjali Sastri, J., in *Sankari Prasad Singh Deo v. Union of India*¹ 3 outlined the basis for this amendment thuswise: "What led to that enactment is a matter of common knowledge. The political party now in power, commanding as it does a majority of votes in the several State legislatures as well as in Parliament carried out certain measures of agrarian reforms in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may be compendiously called Zamindari Abolition Acts. Certain Zamindars feeling themselves aggrieved, attacked the validity of those Acts in Courts of law on the ground that they contravened the fundamental rights conferred on them by Part III of the Constitution. The High Court of Patna⁴ held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad⁵ and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh respectively. Appeals from those persons are pending in this Court. Petitions filed in this Court by some other Zamindars seeking the determination of the same question are also pending. At this stage the Union Government with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution which, after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution First Amendment Act, 1951."

In the instant case, Sankari Prasad's case³, the validity of Arts. 31-A and 31-B was questioned but they were upheld as quite constitutional and within the powers of Parliament for constitutional amendment. In effect by the operation of Art. 31-A, no law is liable to attack on the ground for want of a provision for compensation or that there is no public purpose⁶ or that it violates some other fundamental right under Part III of the Constitution, e.g., Art. 14. This is indeed a sweeping reform affecting only 'Estates' and not other lands or interests. Nevertheless, it is permissible to ponder if it is not expropriatory in the extreme if compensation is altogether denied. What is granted by Art. 41 (2) appears to be taken away by this article.

1-3. 1952 S. C. R. 89: 1951 S.C.J. 775.

4. *Kameshwar Singh v. State of Bihar*, A.I.R. 1951 Pat. 91.

5. *Surya Pal Singh v. U. P. Gov-*

ernment, A.I.R. 1951 All. 674.

6. *Gangadhar Rao Narayan Rao Mazumdar v. State of Bombay* A.I.R. 1955 Bom. 28.

Proviso.

It is the proviso that provides the sole safeguard to acquisition of 'Estates'. Where the Bill is passed by the legislature of a State, it cannot be a valid law till it receives the assent of the President of the Republic. The assent of the President, after the reservation of the same under Art. 200, enables the impugned law to claim protection under Art. 31 A.

Hence though 'Estate' under Art. 31 A is deprived of this usual constitutional remedy under Art. 32, the President is constituted as the sole judge for deciding if a State law acquiring estate has or has not complied with the requirement of Art. 31 (2)⁷. The proviso in Art. 31 A does keep alive Art. 31 (3) to see if a State law has satisfied the provisions in Art. 31 (2).

Art. 31 (4) and 31 A compared.

Patanjali Sastri, C.J., analysed these two articles thus⁶ :

(1) The scope of Art. 31 (4) is at once narrower and wider than Art. 31 A.

(2) The former has application only to statutes which were pending in the legislature at the commencement of the Constitution whereas the latter is subject to no such restriction.

(3) Again Art. 31 (4) excludes attack only on the ground of contravention of Art. 31 (2) while Art. 31 A bars objections based on contravention of other provisions of Part III as well, such as Arts. 14 and 19. This indeed was the reason for the enactment of Arts. 31 A and 31 B as the words of exclusion in Art. 31 (4) were found inapt to cover objections based on contraventions of Art. 14.

(4) On the other hand, the law referred to in Art. 31 (4) covers acquisition of any kind of property while Art. 31 A relates only to the acquisition of a particular kind of property, viz., Estates and rights therein.

(5) What is more important is that the non obstante clause in Art. 31 (4) overrides all other provisions in the Constitution including the lists of the Seventh Schedule whereas a law which falls within the purview of Art. 31 A could only prevail over the 'foregoing provisions of this Part'".

In the same case⁸ it has been posited that the existence of a 'public purpose' is an implied and inherent factor in Art. 31 (2) and that it is a prerequisite to the exercise of power of compulsory acquisition under Art. 31 (2). This in effect means the President when he exercises his assent would refuse it if the factors of 'public purpose' or 'compensation' are totally absent in any legislation. Thus in *Kalika Kumar v. Saurashtra State*⁹ it has been held following the majority view in *Kameshwar's case* A.I.R. 1952 S.C. 252⁸ that Art. 31 A does not debar the Court from questioning the existence of a public purpose behind a law coming under this article.

The opening words of Art. 31 B make it clear that Art. 31 A should not be restricted in its application by reason of anything contained in Art. 31 B and are in no way calculated to restrict the application of the latter article or of the enactments referred to therein to acquisition of 'Estates'.

7. *State of Bihar v. Kameshwar*, A.I.R. 1952 S.C. 252.

8. *State of Bihar v. Kameshwar*

1952 S.C. 252.

9. *Kalika Kumar v. Saurashtra State*, A.I.R. 1952 Sau. 114.

The words 'deemed always to have been inserted' in Sec. 4 of the First Constitution Amendment Act governs Art. 31 A, and hence such an enactment as the Bihar Land Reforms Act, 1950, is validated *ab initio* despite the decision of the Patna High Court in A.I.R. 1951 Pat. 91.

There need not be any vesting in the impugned law of the estate or the rights therein to the State to attract the operation of Art. 31 A⁹. Neither need the acquisition be immediate. It can be gradual or on the initiative of an intermediary person as a tenant and the actual extinguishment of the rights in the estate takes place on payment of compensation by the State⁹.

The word 'law' in the proviso can mean only a 'Bill' passed by the legislature of the State¹⁰.

The term 'Estate' has been defined in Art. 31 A cl. (2) (a) as synonymous to 'Estate' in the existing land tenure in force in the particular area. Jagir, inam, muafi, and other similar grants, namely, revenue-free estates come within the definition. Sec. 3 (2) (d) of the Madras Estates Land Act of 1908 defines on estates as meaning "any village of which land revenue alone has been granted in inam to a person not owing the Kudiwaram thereof, provided that the grant has been confirmed or recognized by the British Government or any separated part of such village".

It will be seen that Art. 31 A takes out the acquisition of Estates or the restrictions of proprietary rights therein, extinguishment or modification of the said rights, from the privilege of protection of any of the fundamental rights in Part III of the Constitution. Art. 31 A (2) (b) lists the rights or interests in the estate which may be affected by the legislation specified in Art. 31 A, such as rights in a proprietor, sub or under-proprietor, tenure-holder or other intermediary or any right in regard to land tenure. All these categories or rights, exercise of same, extinguishment or modification of same can be affected by legislation, even by discriminatory legislation or legislation affording other fundamental rights in Part III of the Constitution. The *carte blanche* power bestowed in Art. 31 A for enacting such legislation free from the limitations on Arts. 13 to 32 is very sweeping in nature indeed. The predominant under-lying purpose of Art. 31 A appears to be to allow immediate reforms being ushered in the matter of 'Estates' and 'allied' tenures where the tiller of the soil had been placed in a most disadvantageous position. It is his emancipation that is sought after so that he may soon occupy the same position as that of the ryot in ryatwari tenure. The idea is being expanded in free countries as Ireland that property in land is not a fundamental right. How far this is sound, experience and history are yet to teach humanity. There ought to be a recognition of a person's proprietary right though the state may restrict the quantum in the interest of the general welfare of the society. It is peculiar to note that in the Congested Area Board of Ireland the peasantry have been given the power to acquire land, break up holdings or make an uneconomic holding an economic holding by taking land from a neighbouring owner. The Board is given the right to decide the question of compensation which is not subject to any further judicial scrutiny.

In *Gangadhar Rao N. Mazumdar v. State of Bombay*¹¹ a rather sweeping connotation has been given to the term 'Estate'. It has been stated that

10. *Ram Dubey v. Government of M. B.*, A.I.R., 1952 M. B. 57.

11. A.I.R. 1955 Bom. 28.

the estate contemplated by Art. 31 A is a tenure or a right in property which tenure or right is defined as an estate under any local law dealing with land tenures; and in the land revenue code 'estate' is defined in Sec. 3 (5) as meaning any interest in the lands and aggregate of such interest vested in a person or aggregate of persons capable of holding the same. Therefore, it is clear that under Art. 31 A power is given to the state to extinguish or acquire any interest in any land. In the instant case Art. 31 A was held to apply to the Bombay Inams Abolition Act.

The Assam State Acquisition of Zamindaris Act of 1951 has been held *intra vires* as a law providing for acquisition by the state within the meaning of Art. 31 A, even if its definition of estate comprises something more than what is comprised in the six categories included within the term in Sec. 3 (b), Assam Land and Revenue Regulation of 1886¹².

The effect of the Constitution Fourth Amendment in relation to Art. 31-A.

It will be noted that the Constitution First Amendment enacted Art. 31 A so as to provide exceptions to the rule outlined in Art. 31 (2). The rule of justiciable compensation was a stumbling block to the recognition of social reform Acts (statutes) which enabled acquisition of Zamindaris and abolition of permanent settlement without interference from Courts. Hence Art. 31 A was introduced. But as after Art. 31 A, similar social welfare measures in other fields were sponsored through statutes which were attacked as infringing Articles 14, 19 and 31, it was thought necessary by the Constitution Fourth Amendment to safeguard legislations dealing with matters such as,

(1) fixing the ceiling on a holding of agricultural land and consequent adjustment of rights between landlord and tenant *inter se*;

(2) planning of urban and rural areas, utilization of vacant and waste lands and clearance of slum areas;

(3) advancement of national economy by social control over mineral and oil resources;

(4) state management when temporarily necessitated or commercial or industrial undertaking or other undertaking in public interest;

(5) reforms in company law progressively eliminating the managing agency etc.

The First Constitution Amendment had stepped with Arts. 31 A, 31 B and the Ninth Schedule which latter gave the list of twelve excepted legislations from the operation of Part IV of the Constitution. Art. 31 A as it originally stood referred only to acquisition by the state of any 'estate' or rights therein or extinguishment of any rights therein. In the Fourth Constitution Amendment Art. 31 A clause (1) has been completely substituted. Sub-clauses (a) to (e) of the new clause (1) refer to—

(a) acquisition of estate or of any rights therein etc.;

(b) temporary taking over of management of any property by the state in public interest or to secure proper management of the property;

12. *Bhairebendra Narayan Bhup v. State of Assam*, A.I.R. 1956

S.C. 503.

(c) amalgamation of two or more corporations in public interest or to secure proper management of them;

(d) extinguishment or modification of any rights of managing agents, secretaries, treasurers, managing directors, or managers of corporations or of voting rights of shareholders;

(e) extinguishment or modification of rights resulting from agreements, leases, or licence for purpose of searching for, or winning any mineral or mineral oil or in respect of premature termination or cancellation of such agreements, lease or licence.

Sub-clauses (a) to (e) are protected from being questioned as offending Articles 14, 19 and 31.

The proviso to the article adds that where the legislation is by State legislature it should have Presidential assent for the invocation of the protection offered by the new Article 31 A.

It will be noted that the distinction between agricultural and industrial property has been taken away as it finally emerged through Parliament. The state can thus take over temporary management of any property under Art. 31 A cl. (1) (b).

While clauses (b) and (c) refer to public interest or to secure proper management clauses (d) and (e) give plenary powers to the state to reform company law from the evils of managing agency and to advance social control of mineral and oil sources, respectively.

The Fourth Amendment further amends the Ninth Schedule by extending the exceptions to three more statutes, such as the Bihar Displaced Persons Rehabilitation (Acquisition of Land Act) 1950, the United Provinces Land Acquisition Rehabilitation of Refugees Act, 1948 and the Resettlement of Displaced Persons (Land Acquisition) Act, 1948.

The Fourth Amendment also amends Article 305 to make it clear that state monopoly in a particular trade or business does not offend the freedom of trade and commerce extended by Articles 301 and 303. Art. 19 cl. (6) already affords the protection but to remove all doubts on this count Art. 305 also now stands amended.

Art. 31 A clause 2 has minor amendments so as to include 'Janmam right' in sub-clause (a) and 'raiya and under-raiya' in sub-clause (b). These terms portend that the benefit of Art. 31 A is now extended to 'Janman rights' peculiar to Madras Travancore-Cochin 'as also to raiya and under-raiya' in Estates.

The words 'other intermediary' in Art. 31 A (2) (b) of the Constitution, point to the conclusion that the proprietor, sub-proprietor, under-proprietor, tenure-holder, raiya, under-raiya mentioned in that clause are intermediaries and not tenants cultivating the land. The term 'tenure-holders' as used in that clause should be interpreted in that sense¹³.

Judicial Interpretation.

In *Raghubir Singh v. Court of Wards*¹⁴ the Supreme Court has held that the word 'modification' in Art. 31 A means only modification of the proprietary

13. *Hindusthan Vanaspathi Co. Ltd., Bombay v. Municipal Board, Ghaziabad*, A.I.R. 1957

All. 155.
14. A.I.R. 1953 S.C. 373.

right of a citizen like an extinguishment of that right and cannot include within its ambit a mere suspension of the right of management of estate for a time, definite or indefinite. In *Gajpati Narayan Deo v. State of Orissa*¹⁵ it has been posited that so as far as Article 31 (4), 31 A and 31 B are concerned, the law relating to compulsory acquisition is not open to challenge on the ground that the scheme of compensation provided by it, does not conform to what are said to be the accepted attributes of compensation which in this behalf is alleged to mean 'just compensation' and in that sense only, produces no compensation. What is protected under Art. 31 A is the 'law relating to the acquisition of the estate', that is, every part of that law which is reasonably or integrally connected with it as part of the same scheme of acquisition. In *State of Bihar v. Kam-eshwar Singh*¹⁶ it has been posited that the existence of a public purpose as a condition precedent to the exercise of the power of compulsory acquisition being a provision of Art. 31 (2), an infringement of such provision cannot under Arts. 31 (14), 31 A and 31 B be put forward as a ground for questioning the validity of the Act. Even if such existence of public purpose is implicit in Entry 36 in List II and Entry 42 in List III, Arts. 31 (4), 31 A and 31 B will protect the Act from such implied provisions.

In *Mordhwaj Singh v. Vindhya Pradesh State*¹⁷ the V. P. Abolition of Jagirs and Land Reforms Act 1953 was sustained as Art. 31 A applied to the case in view of the definition of Jagir and the use of the word 'resumption' in the statute. Hence all objections to the validity of the Act based on the contravention of Art. 31 (2) or on the adequacy or reasonableness of the compensation are barred.

The Punjab Security of Land Tenures Act 10 of 1953 was sustained¹⁸ as it was not an act aiming at the acquisition of private property. It merely limits the maximum holding of a landlord and lays down a procedure for attaining this object. It, therefore, does nothing more than modify rights in estates which is permissible under the terms of Art. 31 A of the Constitution. Further Arts. 31 A and 31 B applies to whole estates and also part of estates.

That Articles 31 A and 31 B are constitutional and the Constitution First Amendment of 1951 was *intra vires* was clearly laid down in *Sankaran Prasad v. Union of India*¹⁹.

In *Prem Manjari v. State of Bihar*²⁰ Section 4 (h) of the Bihar Land Reforms Act 30 of 1950 has been held *intra vires* of Art. 31 A. Section (4) (h) confers authority on the Collector to make enquiries in respect of any transfer including the settlement or lease of any land comprised in an estate or tenure. It is obvious that the transferee or the lessee of land comprised in an estate or tenure has an interest or right in such estate or tenure. The section must be taken to be a law providing for acquisition of any estate "or of any right therein or for the extinguishment or modification of such rights" within the meaning of Art. 31 A of the Constitution. The primary matter dealt with by this legislation of which Sec. 4 (h) is an integral part in its pith and substance deals with the acquisition of estates or tenures falling within Entry 36 of List II and is therefore protected under Article 31 A.

15. A.I.R. 1953 Orissa 185. See *Mohammad Raza Ali v. State of Uttar Pradesh*, A.I.R. 1953 All. 92.
16. A.I.R. 1952 S.C. 252.
17. A.I.R. 1954 V.P. 24. Relies on A.I.R. 1952 S.C. 252 and A.I.R. 1953 S.C. 373.

18. *Bhagirath Ram Chand v. State of Punjab*, A.I.R. 1954 Punj. 167.
19. A.I.R. 1951 S.C. 458 reiterated in *Sarwal v. State* A.I.R. 1954 Hyd. 227.
20. A.I.R. 1954 Pat. 550.

In *Amar Singh v. State of Rajasthan*²¹ it has been held that the very fact that the Rajasthan Land Reforms and Resumption of Jagirs Act 6 of 1952 (as amended by Act 13 of 1954) provides for payment of compensation is the clearest possible indication that the Act is for the acquisition of Jagirs and not for resumption as the word is well understood. Here the property is being taken away not because of any breach of condition of any grant under which it was given to the jagirdars but on payment of compensation. The application of Art. 31 A cannot therefore be excluded on the ground that the Rajasthan Act is not an act for acquisition of estates.

In a recent Bombay case²² it was posited that the whole object of Art. 31 A was to give to the expression 'Estate' the widest meaning. When there is a confiscatory legislation cured by Art. 31 A, there is no point in making fine distinction between one tenure and another. The word 'estate' has the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area. Under the Land Revenue Code 'Estate' is defined as any interest in land²³. By the amendment in Art. 31 A Parliament has merely expressed its confidence in the good sense of the State legislature which passed the Bombay Merged Territories Act 45 of 1953²² and has prevented its being questioned in a Court of law. Therefore, no further power is yielded to confiscate other private individual's properties.

The Supreme Court has posited in a Rajasthan case that the word 'Jagir' in Art. 31 A cannot be construed in a limited sense as grant made for military service. It includes maintenance grants also.²⁴ As the object of Art. 31 A is to abolish all intermediaries, the word Jagir must be construed in the most liberal sense, so as to include express or implied grants, grants made in exercise of the sovereign power of the Ruler or made by the legislature in the exercise of its sovereign rights. Even if no rent or payment is tacked on to the ownership of an estate it will be muafi falling within the ambit of Art. 31 A. Want of public purpose or absence of compensation are no criteria for invoking Art. 31 A²⁴. Even for application of Art. 31 (2) it must be shown to strike down an Act that the true intention of the law was to take properties without making any payment, that the provisions relating to compensation are merely veils concealing that intention and that the compensation payable is so illusory as to be no compensation at all²¹.

Art. 31 B must not be read as limiting Art. 31 A²⁵. The power of the legislature to legislate in respect of Jagirs of merged States was upheld by the Supreme Court in *Umeg Singh v. State of Bombay*²⁶. Where the Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1954 was held *intra vires* notwithstanding the terms of guarantee in clause (5) of the letter of guarantee accompanying merger agreements entered into by the Rulers of the merged States of Bombay and the then Dominion Government²⁶.

While upholding the constitutionality of the Saurashtra Barkhali Abolition Act it has been posited by the Saurashtra High Court²⁷ that, however repugnant

21. A.I.R. 1954 Raj. 291.

22. *Chaniprajbhai Harsurbhai v. State of Bombay*, A.I.R. 1955 N.U.C. 1533.

23. *Gangadhara Rao N. Mazumdar v. State of Bombay*, A.I.R. 1955 Bom. 28.

24. *Amar Singhji v. State of Rajasthan*, A.I.R. 1955 S.C. 504.

25. *Nathu Bhai Gandabhai v. State of Bombay*, A.I.R. 1955 N.U.C. (Bom.) 2318.

26. *Umeg Singh v. State of Bombay*, A.I.R. 1955 S.C. 540.

27. *Sayed Badasaheb Motimiyani v. State of Saurashtra*, A.I.R. 1955 Sau. 80.

the impugned law may be to its sense of justice, it is not possible for the Court to examine the contents of the law in question on the question of quantum of compensation. It is the repugnancy between the articles in Part III of the Constitution and an impugned Act coming within the purview of Arts. 31 A and 31 B that indicates the 'inconsistency' cured by Articles 31 A and 31 B²⁸.

In *Parshram Damodhar v. State of Bombay*²⁹ it was held that it was futile to contend that in so far as the Bombay Tenancy and Agricultural Lands Act (67 of 1948 as amended by Act 13 of 1956) purported to vest in the State property belonging to the landlords by extinguishing their interest in the land, it was not saved by Art. 31 A, that it was inconsistent with Art. 31 since no provision for payment of compensation was made and that therefore it was void. For Art. 31 A is an exception to Art. 31 and even if it is assumed that the provision relating to landlord's interests in land are not protected by Art. 31 cl. (1), they are indeed protected from the operation of cl. (2) of Art. 31 A cl. (1) (a). Interest of landlord in land must be regarded as an estate within the meaning of S. 3 (5) of the Land Revenue Code within the meaning of Art. 31 A (1) (a). The Constitution has expressly provided that notwithstanding anything contained in Art. 13, any law which provides *inter alia* for the extinguishment or modification of any right in an estate shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred under Art. 13, 14, 19 or 31. Hence Secs. 32 to 32 R of the Bombay Act which provides for the existence of the interest of the landlords and conveyance thereof to the tenants and also the procedure in that behalf cannot be regarded as inconsistent with the Constitution. The restriction placed by Art. 31 A upon the right of the landlord in taking possession of the land held by his tenant are imposed under the law and are *intra vires* of Arts. 31 (1) and 31 A (1) (a). There are further restrictions imposed by Art. 31 B on the landlord relating to termination of tenancy, prevention of fragmentation of the holding, etc., which are also *intra vires* of the aforesaid articles.

In *Biswambar Singh v. Orissa State*³⁰ Narasimham, J., has posited that the expression 'existing law' should ordinarily be construed in the light of the definition given in Art. 366 (10) of the Constitution. When so construed it would mean only statute law and not mere custom or usage embodied in the record of rights. The dictionary meaning of the expression 'existing law' is wholly inapplicable in Art. 31 A (2) (a). Hence the special meaning of the expression 'existing law' given in Art. 366 (10) should apply and there is nothing in the context of Art. 31 A (2) (a) to give a wider meaning to that expression. The expression 'estate' in Art. 31 A (2) (a) is also clear and has the same meaning as is given to that expression in the existing law relating to land tenures. A mere mention of expressions 'estate', 'Zamindari', 'intermediary' in the record-of-rights is not itself sufficient to make these properties estates as defined in Art. 31 A (2) (a). Once the Supreme Court holds particular areas to be not 'estates' within the meaning of record-of-rights, they would necessarily not be 'estates' within the meaning of Art. 31 A (2) (a)³¹.

In the instant case³⁰ it was held that Hamgir and Sarapgath Zamindaris were implied grants from the Ruler of Gompur and as such would come within the latter part of the definition of the expression estate as given in Art. 31 A (2) (a)

28. *Gopalakrishna v. Krishna*

A.I.R. 1955 Andhra 264.

29. A.I.R. 1957 Bom. 252.

30. A.I.R. 1957 Orissa 247.

31. *Vide Biswambar Singh v. State*,
A.I.R. 1954 S.C. 139.

and so would be protected from the challenge that it contravenes the fundamental rights described in Part III of the Constitution³⁰.

In *Balabhau Manaji v. Bapuji Satwaji Nandanwar*³² it has been posited that Art. 31 A (1) (a) does not deal with any and every right; it deals with an estate or a right therein and the extinguishment must be of such a right. A right which the owner of the property has to claim substitution for a vendee when adjoining property is sold to a third party without notice to him is not a right in any estate but a right purely personal to the occupant arising only in the event of there being a sale. Hence Art. 31 A can have no application to a right of pre-emption and therefore in the instant case³² it was held that S. 242 (3) of the M. P. Land Revenue Code was not saved by Art. 31 A.

The legislative competence of the state legislature can only be circumscribed by express prohibition contained in the Constitution itself and unless and until there is any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally there is no fetter or limitation on the planning powers which the State legislature enjoys to legislate on the topics enumerated in the Lists II and III of the Seventh Schedule³³. In the instant case anent Bombay Merged Territories and Areas (Jagirs Abolition) Act 39 of 1954, the statute was held *intra vires*. The right of the State Government of Bombay to pass any legislation with regard to the enjoyment of the ownership of Jagir lands was expressly reserved and this right covered also legislation, in regard to abolition of Jagirs³³.

Under Art. 240 the State legislature was invested with the power to legislate on the topics enumerated in Lists II and III of the Seventh Schedule and this power was by virtue of Article 245 (1) subject to provisions of the Constitution. The limitations on this power are given in Article 303 or 286 (2). But unless and until the court came to the conclusion that the Constitution itself had expressly prohibited legislation on the subject either absolutely or conditionally the power of the State legislature to enact legislation within its legislative competence was plenary³³.

The object of Art. 31 A was to save legislation which was directed to the abolition of intermediaries, so as to establish direct relationship between the State and the tillers of the soil³⁴. Maintenance grants in favour of persons who are not cultivators, such as members of the ruling family, would be Jagirs for purposes of Art 31 A³⁴. For purposes of this Article, 31 A, it would make no difference whether the grant is made by the Sovereign in the exercise of his prerogative right or by the legislature in the exercise of its sovereign rights.

Clauses (3) and (4)

Clauses (3) and (4) of Art. 31 and the proviso to Art. 31 A deal with consequences flowing from the President giving his assent to a Bill passed by a State legislature relating to acquisition of estates (*vide* Art. 261). There can be no further scrutiny of the assent if already given by the President to a Bill relating to such acquisition³⁵.

In *Parashram Damodhar Vaidya v. State of Bombay*³⁵ it was held that they were incidental provisions in the Bombay Act XIII of 1956 (Secs. 31 A,

32. A.I.R. 1957 Bom. 233.

33. *Umeg Singh v. State of Bombay*, A.I.R. 1955 S.C. 540.

34. *Amar Singh v. State of Rajasthan*, A.I.R. 1955 S.C. 504.

35. *Sankarsana Ramanuja v. State of Orissa*, A.I.R. 1957 Orissa 96; I.L.R. (1957) Cut. 1.

36. A.I.R. 1957 Bom. 252; 59 Bom. L.R. 616.

31 B, 31 C and 31 D) intended to effectuate the policy of the legislature that even for his personal cultivation the landlord shall not be entitled to deprive the tenant of all the land so as to take away from the tenant his means of livelihood. These provisions, though stringent, were held not to conflict with the right to property as guaranteed under the Constitution. Sections 32 to 32 R which provide for extinction of the interest of the landlords and the conveyance thereof to the tenants and also the procedure in that behalf were held *intra vires*³⁶.

These words 'other intermediary' in Art. 31 A (2) (b) point to the conclusion that the proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat, mentioned in that clause are intermediaries and not tenants cultivating the land³⁷. The term 'tenure-holder' as used in that clause must be interpreted in that sense³⁷.

Art. 31 A has no application to a right of preemption³⁸. The term 'existing law' in Art. 31 A (2) is only statute law and not mere custom or usage embodied in the record of rights, *vide* Article 366 (10)³⁹.

Where a law relating to an entire estate gets the protection of Art. 31 A, it would necessarily follow that a law dealing with the acquisition of a part of an estate would also get the same protection by reason of the well-known maxim '*omne mapus continet in se menis*'—the greater includes the less⁴⁰. In Art. 31 A (2) (a) the word 'include' has been used in an expansive sense⁴¹. The use of the words 'and', 'also' and 'any' indicate that though some classes of jagir, inam or muafi grant may not come within the definition of 'estate' as given in the law of land tenures in a particular area, the makers of the Constitution intended that all classes of jagirs, inams, and muafi grants should be construed as 'estates' and hence deliberately widened the definition of that expression by saying that it shall also include any jagir, inam or muafi. The *ejusdem generis* construction has absolutely no application so far as the construction of 'inam' in Art. 31 A (2) is concerned⁴⁰.

The right of a landlord in any agricultural land governed by the Bombay Land Revenue Code is, by S. 3 (5), a estate and the right of the landlord to terminate the tenancy of a tenant in occupation and to obtain possession is a right in an estate⁴¹. But the restriction sought to be placed upon the right of the landlord by the impugned provision, e.g., S. 34 (2A) of the Bombay Tenancy and Agricultural Lands Act does not amount to extinguishment or modification of that right⁴¹. The modification contemplated by Art. 31 A is a modification in the proprietary right and not in the method of enforcement of the right^{41a}.

In *Surendranath Jana v. State of West Bengal*⁴² it was pointed out that reading Art. 31 A with the provisions of the West Bengal Estate Acquisition Act (1 of 1954), it was clear that the interests of a raiyat or under-raiyat must now be regarded as if it was an estate or right in an estate of an intermediary as referred to in both these provisions of law. Chapter IV of the Act has

37. *Hindustan Vanaspati Co. Ltd., Bombay v. Municipal Board, Ghaziabad*, A.I.R. 1957 All. 155; 1957 All. L.J. 126.

38. *Balabhan Manaji v. Bapuji Satwaji Nandanwar*, A.I.R. 1957 Bom. 233.

39. *Bhiswambhar Singh v. State of Orissa*, A.I.R. 1957 Orissa 247;

I.L.R. (1957) Cut. 299.

40. *Sankarasana Ramanuja v. State of Orissa*, A.I.R. 1957 Orissa 96; I.L.R. (1957) Cut. 1.

41. *Ibid.* (1899) A.C. 99 (105, 106).

41a. *Abdul Rahman Jamaluddin v. Vittal Arjun*, A.I.R. 1958 Bom. 94; 50 Bom. L.R. 579.

42. 62 Cal. W. N. 14.

affected such rights and the raiyat or under-raiyat is now in the same position as any other intermediary, as defined by the Estate Acquisition Act.

Section 52 of the West Bengal Estates Acquisition Act of 1954, was held *intra vires* in *Ananta Kumar Dutta v. Land Revenue Officer Nadia*⁴³, in so far as it includes the rights of raiyat who is not a true intermediary, but is in actual possession of the land. For, the provisions of Art. 31 A (2) (b) as they stand at present enable the acquisition of the entire interest of raiyats and under-raiyats in the same manner as a true intermediary.

The constitutional validity of the Punjab Consolidation of Land Proceedings (Validation) Act 6 of 1954 was attacked successfully in *State of Punjab v. S. Kehar Singh*⁴⁴. The very preamble of the Act says that it is meant to provide for extinguishment and modification of rights in an estate without payment of compensation and as any deprivation of property would be covered by Art. 31 the Act would be void as violative of that article. Art. 31 A or 31 (2 A) could not avail in this instance to save the unconstitutionality⁴⁴. The statute in question offended also Art. 14.

It is incorrect to construe Art. 31 A in such a manner as to render the word 'modification' occurring therein wholly redundant⁴⁵. Both the words 'extinguishment and modification' which find place in Art. 31 A must be given their respective meanings and significance. The difference in the import of these two words lies in the degree of the impairment or invasion of the rights in an estate. While extinguishment indicates a total annihilation of the right, whether it be in respect of the entire estate or part of it, modification covers a case where a right in the estate is abridged or impaired short of extinguishment to the prejudice of the person in whom the right resides⁴⁵. It will be therefore wrong to contend that anything short of extinguishment will not be covered by Art. 31 A. Thus the right of the landlord to resume land for personal cultivation, when it is curtailed so as to preclude him from recovering the extent of land he desires or actually needs, is only a 'modification' of his right in the estate.

In *Raghubir Singh v. State of Ajmer*⁴⁶ the Supreme Court held that the Legislature was competent under entry 18 of List II Sch. VII of the Constitution relating to land to enact S. 8 of the Ajmer Abolition of Intermediaries and Land Reforms Act. The Legislature has the power to pass even retrospective legislation. The impugned provision was held to be ancillary in character enacted for carrying out the objects of the Act more effectively. The section merely vested power to the collector to cancel all leases made with intent to defeat the legislation for abolition of intermediaries. Similarly, under S. 38 of the impugned act last Bhuswamis who were given some lands for personal cultivation abused it and let the land to others, a maximum rent of one and half times the revenue payable for the land was fixed for such leases, so as to dissuade Bhuswamis from letting the land out. S. 38 and S. 38 were held *intra vires* of Art. 31 A.

In *Atma Ram and others v. The State of Punjab*⁴⁷ it was held by the Supreme Court that the Punjab Security of Land Tenure Act 10 of 1953 as amended by Act 11 of 1955 is not beyond the legislative competence of the State Legislature. (Sch. VII List 2 entry 18). The legislation limiting extent of land in

43. A.I.R. 1958 Cal. 143.

44. A.I.R. 1959 Punj. 8.

45. *Sant Singh v. State of J. & K.*
A.I.R. 1959 J. & K. 35 A.I.R.
1953 S.C. 373 Explained.

46. A.I.R. 1959 S.C. 475.

47. A.I.R. 1959 S.C. 519 relies on
A.I.R. 1959 S.C. 459 overruled
A.I.R. 1959 Punj. 8. A.I.R.
1954 Punj. 167 approved.

possession of land owner for cultivation so as to release larger areas for the use of tenants, was held *intra vires* of the Legislature's powers. The words 'estates' or 'rights' in Art. 31 A have been deliberately used in a wide sense⁴⁷. Keeping in view the fact that Art. 31 A was enacted by two successive amendments one in 1951 (First Amendment) and the second in 1955 (Fourth Amendment) with retrospective effect, in order to save legislation affecting agrarian reforms, it was held that those expressions have been used in their widest amplitude, consistent with the purpose behind those amendments. The word 'estate' must be construed in an all inclusive sense. The expression 'rights in relation to an estate' again has been used in a very comprehensive sense of including not only the interests of proprietors or sub-proprietors but also of lower grade tenants, like raiyats, or under-raiyats and 'other intermediaries'. The last word is added to show that the list is only illustrative and not exhaustive.

In *Sri Ram Ram Narain v. State of Bombay*⁴⁸. The Bombay Tenancy and Agricultural Lands (Amendment) Act 13 of 1956 was held as saved by Art. 31 A though it was attacked as having violated Arts. 14, 19 and 31. The impugned Act was not a law for the acquisition by the State or any estate or of any rights therein because even the provisions with regard to the compulsory purchase by tenants of the land on the specified date transferred the title in those lands to the respective tenants and not to the State. Art. 31 A (1) (a) talks of two distinct objects of legislation, one being the acquisition by the State of any rights therein and the other being the extinguishment or modification of any such rights. If the State acquires an estate or any rights therein that acquisition would have to be a compulsory acquisition within the meaning of Art. 31 (2 A) which was also introduced in the Constitution by the Constitution (Fourth Amendment) Act. 1955 simultaneously with Art. 31 A (1) thereof. There was no provision made for the transfer of the ownership of any property to the State or a corporation owned or controlled by the State with the result that even though the provisions of the impugned Act deprived the landholders of their property they did not amount to a compulsory acquisition of the property by the State. In the impugned statute the title to the land which was vested originally in the landlord passes to the tenant on the tillers day or the alternative period prescribed in that behalf. This title is defeasible only in the event of the tenant failing to appear or making a statement that he is not willing to purchase the land or committing default in payment of the price thereof as determined by the specified tribunal. The tenant gets a vested interest in the land defeasible only in either of those cases and it cannot be said that the title of landlord to the land is suspended for any period definite or indefinite. When this is so there is an extinguishment or in any event a modification of the landlord's right in the estate well within the meaning of those words used in Art. 31 A (1) (a).

Article [31-B. Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any

48. A.I.R. 1959, S.C. 459.

judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.]

COMMENTARY.

This Article, 31 B, is the result of the First Constitution Amendment Act, 1951. Section 5 of the Act stipulated thus, "*Insertion of New Article 31 B.* — After Art. 31 A of the Constitution as inserted by section 4 the following article shall be inserted, namely....."

The article is the consequence of the decision in *Kameshwar v. State of Bihar*⁴⁹ and other similar decisions.

Thus the particular acts scheduled out in the new Ninth Schedule are validated by this constitutional amendment despite judicial opinion to the contrary.

Art. 31 B stands independent of Art. 31 A and is not illustrative of the latter. While it overrides all judicial decisions regarding the constitutionality of an Act it subordinates the 'Act' to the will of the legislature in the sphere of repeal or amendment. Thus the statutes mentioned in the Ninth Schedule are subject to this legislative control though free from judicial scrutiny in respect of any of the fundamental rights specified in Part III of the Constitution.

The practice of validating statutes by constitutional amendment despite judicial condemnation, is not however very healthy. If Parliament generally resorts to this method of annulling judicial pronouncements, the freedom charter assured in the Constitution may very soon disappear in manifold respects. A certain restraint is, therefore, needed on the part of Parliament and constitutional amendment should never be resorted to unless in very compelling circumstances in the overriding interests of the welfare State. Individual freedom should not be prostituted or bartered at the illusory claim of a supposed public benefit which may not be after all so real or compelling as to call for a change. A *via media* policy is always commendable. It is even better if the Constitution contains specific directions as to when constitutional amendment may be resorted to. Mere fixation of a requisite majority vote is not a safe criterion. The basic principles of constitutional amendment may as well be safely detailed out. This may not altogether be out of tune with our Democratic set-up.

Ninth Schedule.

This new schedule was added by Art. 31 B to validate the following Acts though they transgressed the provisions of Art. 31:—

1. The Bihar Land Reforms Act 1950 (Bihar Act XXX of 1950).
2. The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).
3. The Bombay Maleki Tenure Abolition Act of 1949 (Bombay Act LXII of 1949).
4. The Bombay Taluqdari Tenure Abolition Act of 1949 (Bombay Act LXII of 1949).
5. The Panch Mahala Meheshwari Tenure Abolition Act, (Bombay Act LXIII of 1949).

49. A.I.R. 1951 Pat. 91, in appeal

A.I.R. 1952 S.C. 252.

6. The Bombay Kholi Abolition Act of 1950 (Bombay Act VI of 1950).
7. The Bombay Pargana and Kulkarni Waten Abolition Act, 1950 (Bombay Act LX of 1950).
8. The Madhya Pradesh Abolition of Proprietary Rights Act, 1950 (Madhya Pradesh Act, 1951).
1948 (Madras Act XXVI of 1948).
9. The Madras Estates (Abolition and Conversion into Ryotwari) Act,
10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act (Madras Act 3 of 1950).
11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act. 1 of 1951).
12. The Hyderabad (Abolition of Jagirs) Regulation, 1358 F, No. XLIX of 1358 Fasli.
13. The Hyderabad (Jagir Commutation) Regulation 1359 F. (No. XXV of 1359 Fasli).

The Constitution Fourth Amendment Act, 1955.

The following additions have been incorporated by this Amendment :—

14. The Bihar Displaced Persons Rehabilitation of Refugees Act, 1950 (Bihar Act XXXVIII of 1950).
15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U. P. Act XXVI of 1948).
16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act IX of 1948).

Judicial Interpretation.

In *Vishweshwar Rao v. State of M. P.*⁵⁰ it was held, that the Supreme Court had no jurisdiction to enquire into the validity of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Land) Act, 1950, on the ground that it did not provide for adequate compensation. Arts. 31 (4), 31 A and 31 B were a bar to any such enquiry. The contention of delegation of powers and that the provisions relating to compensation were a fraud on the Constitution were also negated.

The U. P. Zamindari Abolition and Land Reforms Act 1 of 1951 was upheld in its intents in *Raja Surya Pal Singh v. State of U.P.*⁵¹ though it did not provide for compensation. Arts. 31 (4), 31 A and 31 B were invoked on the question of want of a public purpose and absence of compensation.

*Ahmed-un-Nissa v. State*⁵² validated the Hyderabad (Abolition of Jagir) Regulation, 1358 F., and the Hyderabad (Jagirs Commutation) Regulation, 1359 F., as they had been incorporated in the Ninth Schedule of the Constitution by virtue of Art. 31 B.

50. 1952 S. C. R. 1020 : (1953) 8 D.L.R. 14 (S.C.).

51. 1952 S.C.R. 1056.

52. Writ No. 13 of 1950 dated 30th June, 1952, Hyderabad.

In *K. C. Gajpati Narayana Deo v. State of Orissa*⁵³ it was posited, "So far as the cases which fall within the scope of Arts. 31 (4), 31 A and 31 B are concerned the law relating to compulsory acquisition is not open to challenge on the ground that the scheme of compensation provided by it does not conform to what are said to be the accepted attributes of compensation which in this behalf is alleged to mean 'just compensation' and in that sense only, produces no compensation".

In *Chiman Lal Dipchand v. State of Bombay*⁵⁴ it was contended that the notification issued under Sec. 6 (2) of the Bombay Tenancy and Agricultural Lands Act 67 of 1948 subsequent to the enactment of Art. 31 B constituted new legislation and it was open to a citizen to challenge those notifications on the ground that they violated Arts. 19 (1) (f) and 31 (1). It was held (1) that if Art. 31 B saved the whole of the tenancy Act, then Sec. 6 (2) was as much saved, (2) that the delegation of power by the legislature to the Government to issue the notification was valid and the notifications issued by virtue of that power were also valid.

The Supreme Court has clearly posited in *Dhirwaha Devi Singh Gohil v. State of Bombay*⁵⁵ that the protection under Art. 31 B is not merely against the contravention of certain provisions but an attack on the ground of unconstitutional abridgement of certain rights. It will be illogical to construe Art. 31 B as affording protection only when these rights are taken away by an act in violation of the provisions of the new Constitution but not when they are taken away by an Act in violation of Sec. 299 of the Government of India Act (1935) which has been repealed. That the intention of the Constitution is to protect each and every one of the Acts specified in the Ninth Schedule of the Constitution from any challenge on the ground of violation of any of the fundamental rights secured under Part III of the Constitution irrespective of whether they are pre-existing or new rights, is placed beyond any doubt or question by the very emphatic language of Art. 31 B. Hence in the instant case it has been held that the validity of the Bombay Taluqdari Tenure Abolition Act which is specified in the Ninth Schedule, cannot be challenged on the ground of violation of the provisions of Sec. 299 of the Government of India Act.

Article 31 B must not be read as limiting Art. 31 A, but to the extent that Art. 31 B deals with the specific case of an Act being included in the Ninth Schedule, the Courts have only to look at Art. 31 B in order to decide whether the Act can be challenged or not. They cannot import into Art. 31 B the provisions of Art. 31 A.⁵⁶

The very terms of Art. 31 B envisaged that any competent Legislature would have the power to repeal or amend the Acts and the Regulations specified in the Ninth Schedule thereof and if any such amendment was ever made the *vires* of that would have to be tested⁵⁷. In the instant case⁵⁷ the Bombay Tenancy and Agricultural Lands (Amendment) Act (13 of 1956) was held to be within the competence of the State legislature (Entry 18 List II Sch. VII) and was in no way a colourable legislation. But the impugned Act was a future law within the meaning of Art. 13 (2). It would not in terms be saved by Art. 31 B and has to be scrutinised on its own merits as to its constitutionality. It was

53. A.I.R. 1953 Orissa 185.

54. A.I.R. 1954 Bom. 397.

55. A.I.R. 1955 S.C. 47.

56. *Nathubhai Gandabhai v. State of Bombay*, A.I.R. 1955 N.U.C. (Bom.) 2318.

held to be covered by Art. 31 A and protected from attack against its constitutionality on the score of its having violated Arts. 14, 19 and 31⁵⁷.

In *S. Sant Singh v. State of Jammu and Kashmir*⁵⁸, the inclusion of Jammu and Kashmir Tenancy Act (2 of 1950) in the Ninth Schedule of the Constitution by the President's order was held to make an exception to the provisions in Part III of the Constitution. Art. 370 (1) (d) expressly confers on the President the power to do so. But what was saved by Art. 31 B were the provisions of the Jammu and Kashmir Act as they stood on May 14, 1954 when the Act was included in the Ninth Schedule and not any other or different provisions which was enacted by the State Legislature subsequent to that date. Judged therefore on merits the impugned provisions were held not to offend Articles 14, 19 (1), (f), 19 (1) (G) or 31.

57. *Sri Ram Ram Narain v. State of Bombay* A.I.R. 1959. S.C.

459.
58. A.I.R. 1959, J. & K. 35.

CHAPTER X

RIGHT TO CONSTITUTIONAL REMEDIES

Article 32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

Remedies for Enforcement of Rights Conferred by this Part.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of Habeas corpus, Mandamus, prohibition, Quo warranto and Certiorari whichever may be appropriate for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2) Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided by this Constitution.

FOREIGN CONSTITUTIONS.

Burma

Art. 15 (1) of the Burmese Constitution is a replica of Art. 32 (1) of the Constitution of India.

Art. 25 cl. (2) states [cf. Art. 32 clauses (2) and (3) of Indian Constitution]:

"Without prejudice to the powers that may be vested in this behalf in other courts, the Supreme Court shall have power to issue direction in the nature of *Habeas Corpus*, *Mandamus*, *Prohibition*, *Quo Warranto* and *Certiorari* appropriate to the rights guaranteed in this chapter."

Art. 25 (3) of Burmese Constitution compares with cl. (4) of Art. 32 as hereunder.

The right to enforce these remedies shall not be suspended unless, in times of war, invasion, rebellion, insurrection or grave emergency, the public safety may so require.

Art 27 of Burmese Constitution states :

Except in times of invasion, rebellion, insurrection or grave emergency, no citizen be denied redress by due process of law for any actionable wrong done to or suffered by him".

The U.S.A.

Art. 1 Sec. 9 (2) of the U.S. Constitution postulates:

"The privilege of the writ of *Habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

[Compare this with Art. 32 cl. (4) of India.]

Eire.

Art. 28 (3) 3 of the 1937 Constitution [cf. Art. 32 (4) of India] posits:

"Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in times of war or armed rebellion or to nullify any act done or purporting to be done in pursuance of such law.

"In this sub-section, 'times of war' includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall be resolved that arising out of such armed conflict a national emergency exists affecting the vital interests of the State (First Amendment of the Constitution Act, 1939).

"Times of war shall also include such time after termination of the said armed conflict as may elapse until each of the Houses of Oireachtas shall have resolved that the said national emergency occasioned by such armed conflict has ceased to exist. (Second Amendment of the Constitution Act, 1941.)

Germany

Art. 48 of the 1919 Weimar Constitution postulated: [cf. Art. 32 (4) of India].

"Where public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take the measures necessary for their restoration intervening in case of need with the help of armed forces. For this purpose he is permitted for the time being to abrogate either wholly or partially the Fundamental Rights laid down in Arts. 114, 115, 117, 118, 123, 124 and 153.

"The President of the Reich must, without delay, inform the Reichstag of any measures taken in accordance with paragraph 1 or 2 of this article. Such measures shall be abrogated upon the demand of the Reichstag.

"Where there is danger in delay, the State Government may take provisional measures of the kind indicated in paragraph 2, for its own territory. Such measures shall be abrogated upon the demand of the President of the Reich or the Reichstag."

[Details are to be determined by the Reich.]

Commentary on Foreign Constitutions.

It will be noted that except in the Burmese Constitution where analogous provisions to Art. 32 (1) to (3) are found, there is no other country where there is a guarantee of right to constitutional remedies as a fundamental right.

in itself. In the U.S.A. the 'due process' clause under the 5th and 14th Amendments affords adequate relief without specifically setting it out as a fundamental right *per se*. We have dealt with this in earlier pages.

Art. 27 of the Burmese Constitution quoted above adopts the 'due process' clause of America only to the extent of actionable wrongs and also makes an exception to 'due process' where invasion, rebellion, insurrection and grave emergency are concerned. In the U.S.A. it is assumed that the common law writs give all the protection to the citizen's rights. In England we have the 'prerogative writs' which form the real bulwark of English liberty. In America, however, we have in Art. 1 Sec. 9 (2) the specific prohibition against the suspension of *Habeas corpus*, except in cases of rebellion, or invasion where public safety requires it. Be it noted only *Habeas corpus* can be suspended in the U.S.A. and there is no provision against suspension of any other kind of writ. 'Suspension of *Habeas corpus* cannot be exercised by the President of the U.S.A. without express power derived from the Congress.' It is the 'Congress' which is the supreme authority to judge if public safety does nor does not demand a suspension of *Habeas corpus*.¹ But this power of the Congress is circumscribed to conditions of war or invasion. It is again the province of the courts to say if such a condition exists in any particular place.² The Federal Laws of America, however, state the condition and procedure for the grant of writs. One such act is the Jurisdictional Act of 1920. Both the Supreme Court and District Courts of America issue writs, but the former uses it only in its appellate jurisdiction.³ Where a federal question¹ is involved and the case is not one where there is a right to appeal the dissatisfied party may petition the Supreme Court to decide the question by what is called a writ of *Certiorari* (which means 'let it be certified'). If the Supreme Court grants such a writ, it sends to the Court below a direction to send the federal question up to it for disposal. While appeals are taken as of rights writs of *Certiorari* are in the discretion of courts.⁴ Congress has provided in express terms that the Supreme Court, its several justices, the circuit court of appeals and their several judges and the District Courts shall have the power to issue writs of *Habeas corpus*.⁵ In such cases the Federal Courts issue the writ "(1) after indictment or even conviction, to test the jurisdiction of the State Court, upon the ground that the State law purporting to give the jurisdiction is unconstitutional as tested by the Federal Constitution and (2) before conviction when the accused sets up a Federal authority for the act charged against him."⁶ But Sec. 453 Rev. Statute provides that the writ 'shall in no case extend to a prisoner in jail unless where he is in custody under or by colour of authority of United States or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States, or being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted to be done under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order or sanction

1. *Ex parte Merryman*, (1861) Taney's Rep. 246.

2. *Ex parte Mulligan* (1864) 4 Wall. 2.

3. *Ex parte Clarke*, (1879) 100 U.S. 552.

4. See 'American Constitutional

Decisions' by Charles Fairman, p. 6.

5. Willoughby's 'Constitutional Law of U.S.A.' Student Ed., p. 544.

6. *Ibid.* See *Ex Parte Seibold*, 100 U.S. 371.

of any foreign State or under colour thereof, the validity and effect whereof depend upon the law of nations,⁷ or unless it is necessary to bring the prisoner into court to testify.”

The Supreme Court has in its original jurisdiction the right to issue a writ of *mandamus*. *Maryland v. Soper*⁸ was an instance where such a *mandamus* was issued to remand to State courts a cause improperly removed to Federal Courts. The Eleventh Amendment does not disturb the Federal constitutional rights guaranteed against State violation. “Thus in a series of cases the Supreme Court of the U.S.A. has enunciated the doctrine that the Eleventh Amendment does not grant to States not to their agents a power, unrestrainable by judicial process either to interfere with the exercise of federal rights, or under colour of unconstitutional legislation, to violate the private rights of individuals. Where this danger has been threatened, writs of injunction have been issued and for the performance by State officials of purely ministerial acts prescribed by law, *mandamus* has been awarded.”⁹

The Eleventh Amendment referred to above postulates “that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign State.”

In *Bankers Life and Casualty Company v. John W. Holland*¹⁰ the Supreme Court of America recently posited, “The traditional use of writ in aid of appellate jurisdiction both at common law and Federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. . . . The supplementary review power conferred in the courts is meant to be used only in the exceptional case where there is a clear abuse of discretion or ‘usurpation of judicial power’. The extraordinary writs cannot be used as substitute for appeals even though hardships may result from delay and perhaps unnecessary trial. The petitioner must meet the burden of showing that its right to issuance of the writ is clear and indisputable. As extraordinary remedies they are reserved really for extraordinary causes.”¹⁰

India.

Article 32 presents in a nutshell the entire law as to constitutional remedies for the citizen when his fundamental rights as set out in Part III of the Constitution is affected. Art. 32 itself is a fundamental right guaranteed to the citizen. The other Article 226 is not such a right. Art. 226 enunciates the power of the High Courts to issue certain writs. We propose to deal with these articles in some detail in the succeeding paras as they are so interconnected that it is best to deal with them a little comparatively in the matter of all constitutional remedies open to an affected citizen. The various kinds of writs *Habeas corpus*, *Mandamus*, Prohibition, *Quo warranto* and *Certiorari* etc. are also attempted to be dealt with in some detail for enable a proper appreciation of remedies by writs.

Article 32 Clause (1).

Art. 32 clause (1) extends the guarantee to move the Supreme Court of India for enforcing any of the fundamental rights scheduled in Part

7. *Vide Mcleod case* (1. Hill 377, 25 Wend. 483) where lack of such provision was greatly felt.

8. 270 U.S. 9 and 36.

9. Willoughby's 'Constitutional

Law of U.S.A.' Student Edn. 599. See *Hans v. Louisiana*, 134 U.S. 1; *United States v. Peters* (5 Cr. 115).

10. 94 Law Edn. 106 (U.S.A.); cited in A.I.R. 1955 N.U.C. 5259.

III of the Constitution. This power is sacrosanct and cannot be taken away or suspended except under clause (4) of Art. 32 read with Art. 359 of the Constitution.

Art. 359 postulates that—

1. Where a proclamation of emergency is in operation the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order.

2. An order made as aforesaid may extend to the whole or any part of the territory of India.

3. Every order made under clause (1) shall as soon as may be after it is made, be laid before each House of Parliament.

Except as provided in Art. 359 and clause 4 of Art. 32, the power of the Supreme Court to issue writs cannot be nullified or whittled down by any legislative action. Parliament has no power to enact any statute interfering with the jurisdiction of the Supreme Court. Nothing short of an amendment of the Constitution itself can abrogate or whittle down the powers of the Supreme Court in this direction. In *A. K. Gopalan v. State of Madras*¹¹ it has been rightly stressed, "It is obvious that by the insertion of this Part, the powers of the Legislature and the Executive both of the Union and the States are further curtailed and the right to enforce the fundamental rights found in Part III by a direct application to the Supreme Court is removed from legislative control. The wording of the Article 32 shows that the Supreme Court can be moved to grant a suitable relief mentioned in Art. 32 (2), only in respect of the fundamental rights mentioned in Part III of the Constitution."

Article 32 Clause (2).

This is the empowering clause whereby the Supreme Court derives its sanction to issue directions, or orders or writs in the nature of *Habeas corpus*, *Mandamus*, *Prohibition*, *Quo warrant* and *Certiorari*. The latter writs are all of English origin. Hence it is that the Supreme Court of India may not only issue such writs but also directions, orders or writs analogous to the above, so as to fit in with any circumstances peculiar to India. This enables adaptation or improvement or variation in the desired shape of all the above categories of writs so as to suit Indian conditions and remove all possible technical deficiencies¹².

In other words, the wording of Article 32 clause (2) is so elastic that it permits all necessary adaptations without legislative sanction from time to time so as to enable effective enforcement of the fundamental rights. Even if a proper writ has not been prayed for in a case Art. 32 permits a large discretion to the Supreme Court to give the appropriate relief. The court can frame such writs as the exigencies of a particular case demand.¹³

11. 1950 S.C.J. 170 at 178.

12. *Rashid v. Municipal Board*,
(1910) D.L.R. (S.C.) 53.

dia, (1950). S.C.J. 869: A.I.R.
1951 S.C. 41 (900. Mukherjee,
J. 819, 9217 Das, J.).

13. *Chiranjit Lal v. Union of In-*

With reference to the origin of judicial writs, their nature and effect, history of writs prior to the Constitution of India, scope of Article 32 and the effect of Article 226 of the Constitution,—we propose to deal with these at some length at the end of the commentary on this article after dealing with notes under clauses (3) and (4).

Writs against Military Tribunals can be issued under Art. 34

“Directions, Orders or writs etc.”

In Chiranjit Lal's case¹³ Mukherjee, J., said, “Thus, anybody who complains of infraction of the fundamental rights, guaranteed by the Constitution, is at liberty to move the Supreme Court for the enforcement of such rights and this court has been given the power to make orders and issue directions or writs similar in nature to the prerogative writs of English law as might be considered appropriate in particular cases.

This would indicate that the phrase “writs in the nature of *Habeas corpus*” means writs which are “similar to the prerogative writs of those names under the English law.”

With regard to the words ‘directions, order, writs etc.’ in *Bhailal v. Additional Deputy Commissioner, Akola*¹⁴, Hidayatullah, J., posited, “The meaning of the words ‘directions and orders’ is reasonably clear. They mean directions and orders as commonly understood. By the term ‘writs’ it is not the intention to empower the High Court to issue all the antiquated and obsolete writs numbering hundreds issued by English Courts, an account of which is to be found in the Register of Original Writs and a list in the appendices to Vol. 2 of Holdsworth's *History of English Law* (2nd Edn., p. 608). The word ‘writ’ has been used in the sense of document under the seal of the court issued to a person or authority including Government in appropriate cases commanding them or any of them to do or forbear from doing some act. In this sense the word ‘direction’ in this context may mean that the person to whom it is issued is not commanded peremptorily to do a particular act or to forbear from doing it but is merely guided in the matter of the doing of that duty or forbearance from it. It is obvious that even in the matter of prerogative writs sometimes a command, sometimes a direction is needed. Thus the court may order the release of a detenu. It may issue a writ quashing a proceeding or it may direct that an election be held within a particular time. In cases which are referred to the High Court on a case stated, it may be necessary to give a direction even to the inferior court or an authority how to proceed in the matter, as for example, a reference under the Municipal Law, a reference by a Small Cause Court judge on a question of law or usage having the force of law, or some questions as to the construction of a document which construction may affect the merits of the decision.”

In a Calcutta case¹⁵ it has been posited that the word ‘includes’ connotes amplification of the ordinary meaning of the expression ‘writs in nature of *Habeas corpus* etc.’ It is not as if the words in Art. 32 imply that the court can issue any of the ‘prerogative writs or any writ, direction or order’. For the words ‘directions, orders, writs’ etc. show that they may not necessarily be issued *ejusdem generis* with the five prerogative writs specified by name in the clause¹⁶. The words ‘directions, orders etc.’ refer to a large category which

14. A.I.R. 1950 Nag. 89 : I.L.R. (1953) Nag. 839.

15. *D. Parraju v. General Manager, B. N. Ry.*, A.I.R. 1952 Cal.

610.

16. *Jeshingbai v. Emperor*, A.I.R. 1950 Bom. 363.

include writs in the nature of *Habeas corpus* etc. mentioned in the two articles 32 and 226.¹⁷

Rashid Ahmed v. Municipal Board, Kairana,¹⁷ was an instance where the Supreme Court directed the Municipal Board not to prohibit the petitioner from carrying on his trade as a wholesale dealer and commission agent of vegetables except in accordance with bye-laws as and when framed according to law. A further direction was given to withdraw the prosecution of the petitioner.

Another case of issue of 'direction' was *Mohammed Yasin v. Town Area Committee, Jalalabad*,¹⁸ where the Supreme Court directed the president of the Committee not to prohibit the petitioner's trade in vegetables. It was also held that the bye-laws under which licence fees were sought to be collected were *ultra vires*. Hence a further direction was issued by the Supreme Court that its direction of prohibition was to apply till proper and valid bye-laws are framed and thereafter except in accordance with a licence to be obtained by the petitioner under the bye-laws to be so framed.

In *Dr. B. N. Khare v. Pandit Jawaharlal*¹⁹ it has been held that when under Art. 226 a High Court issues a writ, it acts in '*personam*' as it looked to the fulfilment of its orders to the person of the respondent. In *Ram Narunjan v. Additional District Magistrate*²⁰ it has been posited that writs, directions or orders or of superintendence over inferior courts or tribunals cannot be curtailed, modified or affected by any enactment of the Indian Parliament or of the State Legislature. This is a power which has been given to this court by the Constitution-making authorities and it can only be altered in the manner provided for in the Constitution itself.

Taxing Law and Article 32.

In *Laxmanappa Herumantappa v. Union of India*²¹ the Supreme Court has posited that a special provision exists in Art. 265 of the Constitution that no tax be levied or collected except by authority of law. Clause (1) of Art. 31 must, therefore, be regarded as concerned with the deprivation of property otherwise than by the imposition or collection of tax and inasmuch as the right conferred by Art. 265 is not a right conferred by Part III of the Constitution it cannot be enforced under Art. 32. But where the petitioner had himself voluntarily applied for settlement under Sec. 8A of the Taxation of Income (Investigation Commission) Act, 1947, and paid a portion of the tax proposed by him and after the petitioner's proposal was accepted by the Government he moved under Art. 32 for a writ that Ss. 5, 6, 7, 8 of the Act XXX of 1947 were in themselves invalid and *ultra vires* on the basis of the ruling in A.I.R. 1954 S.C. 545²² and that therefore the tax proposal erroneously made by him was of no binding effect. The Supreme Court held in *Gopal Das v. Union of India*,²³ that unless and until the petitioner could establish that his consent was improperly procured, he could not complain of infringement of fundamental rights. Art. 32 was not intended for relief against the voluntary actions of a person and in the instant case because of his request for a settle-

17. A.I.R. 1950 S.C. 113: 1950 S.C.R. 566.

18. A.I.R. 1952 S.C. 115: 1952 S.C.R. 572.

19. A.I.R. 1952 Nag. 302.

20. A.I.R. 1952 All. 822. 825.

21. A.I.R. 1955 S.C. 3, relies on A.I.R. 1951 S.C. 97, *Ramji Lal v. Income Tax Officer, Mohindergarh*.

22. *Suraj Mal Mohta and Co. v.*

23. A.I.R. 1955 S.C. 1.

ment no assessment was made against him by following the whole of the procedure of Income Tax Act.

Relative Powers under Articles 32 and 226.

In *Veerappa Pillai v. Raman and Raman*²⁴ the import of the powers given under Art. 226 was examined. The Supreme Court held, "Such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it or in violation of the principle of natural justice or refuse to exercise a jurisdiction vested in them or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be it seems to us that it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made."

It will be noted that in assessing the relative powers conferred under Articles 32 and 226 the following points arise:

1. The large power vested under Articles 32 and 226 on the Supreme Court and High Courts respectively should be exercised in accordance with well-established principles.²⁵

2. The large powers so invested are not necessarily unlimited. There is the limitation of self-restraint and discretion vested in the exercise of these powers. The limitation is one of jurisdiction and power intended to promote the proper public administration of the country.²⁶

3. The power under Art. 32 and Art. 226 is not limited to the issuing of the five prerogative writs catalogued in the two articles.²⁷

4. The High Court and the Supreme Court have no power to sit as a court of appeal in regard to merits of the order of the inferior authority. The discretionary power does not extend to an examination of the merits. They can only examine such questions as want of or excess of jurisdiction, violation of the principles of natural justice, refusal to exercise jurisdiction, error apparent on the face of the record etc.²⁸

5. The power does not also extend to direct the inferior authority to pass a certain order on merits or itself (the Supreme Court or the High Court) pass such an order unless the decision is erroneous on the face of the record.²⁹

6. But the High Court can direct an inferior authority to pass an order according to law when it does not involve the discretionary judgment of that authority.²⁷

It may be pointed that in the *Veerappa Pillai* case²⁸ the question was about permits for plying buses. The issue of permit was under law left to the discretion of the transport authorities. Hence the Supreme Court could not traverse that ground on merits. But in *Bhailal's* case in the *Nagpur*

24. A.I.R. 1952 S.C. 192 and 1952 S.C.R. 583.

25. *Janardhan Reddy v. State of Hyderabad*, A.I.R. 1951 S.C. 217; 1951 S.C.R. 344.

26. *Veerappa Pillai v. Raman Ram-*

an Ltd., A.I.R. 1952, S.C. 192: 1952 S.C.R. 583.

27. *Rashid Ahmed v. Municipal Board, Kairana* A.I.R. 1950 S.C. 163; 1950 S.C.R. 566.

High Court²⁸ there was no discretionary power left to the Rent Controller under the law except to grant permission to the landlord to terminate the tenancy. Hence the High Court could quash the order of the Rent Controller as the finding on which the order was based, namely, that the landlord did not need the premises for his own use, was erroneous on the face of the record. Consequently, the High Court could certainly direct the rent controlling authority to grant permission to the petitioner to determine the tenancy of his tenant, as in fact the Rent Controller was bound under law to accord such permission. There was no discretion at all involved in the matter.

One of the well-established principles governing the grant of writs, orders, direction etc. is the question whether there is any other alternative remedy. As has been pointed out in an Allahabad High Court's judgment²⁹ there is an essential difference between the British and Indian legal systems in that in the latter there are special provisions for revisional jurisdiction in the procedural code of this country. Malik, C.J., added, "We think that the principle governing writs of *certiorari* and prohibition should be that courts should refuse, normally speaking, to entertain applications for writs, directions or orders for *certiorari* or prohibition where the ordinary remedy of approaching the court by an application in revision is available to the party concerned."

But where it is an infringement of a fundamental right guaranteed under Part III of the Constitution, Art. 32 gives a sure remedy by an approach to the Supreme Court under Art. 32. Only when it is some other right that is infringed do considerations as set out above arise. Article 226 applies to all kinds of rights and remedies therefor. But both the High Court (under Art. 226) and the Supreme Court (under Art. 32) have concurrent jurisdiction in the matter of enforcement of fundamental rights. In the High Court it is a case of general jurisdiction but in the case of the Supreme Court it is definitely a special responsibility. The right to move the Supreme Court for enforcement of a fundamental right is itself guaranteed under Art. 32 (1) as a fundamental right. While Art. 32 is confined to enforcement of fundamental rights Art. 226 extends to other rights also.

The Supreme Court acting under Art. 32 cannot refuse to exercise its jurisdiction on the ground that the applicant should have approached the High Court in the first instance.³⁰ The jurisdiction of the Supreme Court under Art. 32 extends to the whole of India while under Art. 226 the High Court can claim jurisdiction only within the territory of the State concerned.³¹ But where there is no enforcement of any right the Supreme Court or the High Court cannot give a bare declaration of the right under cover of proceeding under Articles 32 and 226. Nor can relief be granted for maintaining the *status quo* till parties get their dispute determined in a court of law. Though the proceedings under Articles 32 and 226 are beyond legislative control they are subject to other articles of the Constitution, such as Arts. 329 (b) and 359. Writs under Art. 32 can be only against the State as fundamental rights are enforceable only against the State. But writs and orders under Art. 226 can be against the State, its executive, legislative and judicial limbs, and even against private persons or corporations.

28. *Bhailal v. Additional Deputy Commissioner*, A.I.R. 1953 Nag. 89; I.L.R. (1953) Nag. 839 (F.B.).

29. *Asiatic Engineering Co. v. Achru Ram*, A.I.R. 1951 All 746;

I.L.R. (1952) 2 All. 838.

30. *Romesh Thapper v. State of Madras*, A.I.R. 1950 S.C. 124; 1950 S.C.R. 594.

31. *D. Parraju v. General Manager, B. N. Ry.* A.I.R. 1952 Cal. 610.

The jurisdiction exercised under Articles 32 and 226 are supervisory and visitorial. It is never appellate, revisional, advisory or consultative. The existence of an alternative remedy eschews application of Art. 226. Suppression of material facts also will entail rejection of the application. The writ jurisdiction is not at all retrospective and so matters that had long ago attained finality before the Constitution cannot be affected by resort to Art. 32 or 226. While Art. 32 can be invoked only against the state, under Art. 226 even in the matter of a fundamental right, apart from a remedy against the state or an officer acting on behalf of the state there can be a writ against an individual Government servant acting in his individual capacity.³² In *Rakhladas Mukherji v. Ghose*³³ it has been posited—

- (1) That all high prerogative writs will not be issued where an alternative remedy is available and is adequate.
- (2) But there is no inflexible rule to that effect as the court can issue the writ when it is just, convenient and expedient.
- (3) The test is whether the alternative remedy is efficacious and adequate.
- (4) If the act complained of is done or purported to be done under a statute, it should be seen if the statute itself provides a remedy in which event, the court will refuse or be reluctant to exercise its writ jurisdiction, though it may nevertheless do so in appropriate cases. Though there is an alternative remedy, i.e. where want of jurisdiction is apparent in face of the record or where it offends natural justice, or where the alternative remedy is costly or will cause undue delay—in such cases the writ jurisdiction may be exercised.³³

Only party affected can apply under Articles 32 and 226. There are exceptions to the rule. Thus in a *Habeas corpus* matter, the next of kin, or a friend can apply. A stranger can move for a writ of *certiorari* and prohibition. But in the matter of *mandamus* only the person whose right is infringed can apply. In the matter of a breach of fundamental right, the person who challenges may not be the person affected. Citizens as well as non-citizens can move the Supreme Court under Art. 32. A company or a corporate person can also apply for a writ under Articles 32 and 226. There can be writs under Art. 226 against a State or another State within the Union of India.³⁴ But this can be only in 'appropriate cases' as these words succeed the words 'any government'. In writ matters, Government can never claim a favoured place against citizens. Under Art. 361 (1) presidents, Governors or Rajpramukhs are exempt from legal proceedings in respect of their official acts. This exemption extends also to proceedings under Art. 226 or Art. 32.³⁵ Writs can be against judicial proceedings of courts or tribunals. But no writ of *Habeas corpus* can be either under Art. 32 or 226 in respect of a person who has been imprisoned in execution of a sentence of a court.³⁶ In the case of a discriminatory or *mala fide* order in a particular case by individual officer, in a Bombay case³⁷ it was held that to invoke Article 14 the discrimination must be the direct result of administrative policy. For dismissals

32. *Santipriya v. Surendra Nath*, A.I.R. 1952 Cal. 137.

33. A.I.R. 1952 Cal. 171.

34. *State of Bombay v. Laxmidas*, A.I.R. 1952 Bom. 468.

35. *Laxman Singh v. Rajpramukh of Madhya Bharat*, A.I.R.

1953 M.B. 54.

36. *Janardhan Reddy v. State of Hyderabad*, A.I.R. 1951 S.C. 217.

37. *Dhanraj Mills v. E. K. Kocher*, A.I.R. 1951 Bom. 132.

of Civil Servants the remedy provided is under Art. 371. Art. 32 is not to be resorted to to grant relief against illegal taxation.³⁸

The taxation power is derived from Art. 265. So the right not to be taxed cannot be a fundamental right as Art. 265 is outside Part III of the Constitution. Contractual rights are not fundamental rights and hence Art. 32 cannot be invoked.³⁹ There can be no escape from contractual obligations on the plea that it is against fundamental rights.⁴⁰ Election petitions lie by virtue of Art. 329 and election can never be questioned except by an election petition. A writ is no substitute. Writs under Art. 226 can lie against any person or authority inclusive of military authorities. There is no power under Art. 226 or Art. 32 to grant interim relief to maintain the *status quo* till parties file a suit. But pending final orders on the writ application there can be an interim order or direction.⁴¹ As stated by the Supreme Court,⁴² "an interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding."

There is no period of limitation for writs under Art. 226. But laches may be a good ground for refusing a writ.⁴³ Successive applications for high prerogative writs will not be allowed generally.⁴⁴ So a writ must be fully supplied with all materials. A defective application may be dismissed and successive applications curing the defects will not enhance the chances of getting a writ order,⁴⁵ while a writ may be allowed on the ground of defiance of the principles of natural justice. The latter term embodies the principle of 'due process of law'—the right to be heard, the right for the usual procedure to be followed, *i.e.* the trial of cases, etc.

Habeas corpus writ.

In the matter of *Habeas corpus* Art. 32 is supreme and is not subject to legislative control. It is thus both a constitutional and fundamental right. But no *Habeas corpus* lies where the person is convicted in a criminal trial.⁴⁶ Decisions of inferior courts cannot be defeated by a *Habeas corpus* writ.⁴⁷ Arrest in contravention of privilege can be cured by a *Habeas corpus* writ.⁴⁷ A person in detention under the Detention Act can be summoned on a writ of *Habeas corpus*.⁴⁸ Where the detention of undertrial prisoners is according to law, no writ for *Habeas corpus* will lie.⁴⁹ Bail is the proper remedy.⁵⁰ Detention under Foreigners Act can be questioned only when it is against the procedure established by law.⁵¹

38. *Ramji Lal v. Income Tax Officer, Mohindargarh*, A.I.R. 1951 S.C. 97.

39. *Satishchandra Anand v. Union of India*, 1953 S.C.A. 293.

40. *Krishna Kutty v. State of Tr. Cochin*, A.I.R. 1952 Tr. Co. 287.

41. *Ouseph v. Minister of Food, T. C. State*, A.I.R. 1951 Tr. C. 226.

42. *State of Orissa v. Madan Gopal*, A.I.R. 1952 S.C. 12.

43. *Nathamoni v. Visvanatha*, A.I.R. 1951 M. 250.

44. *Dhan Bahadur Ghorti v. State of Assam*, A.I.R. 1953 Ass. 62.

45. *R. v. Bodmin Corporation*, (1892) 2 Q.B. 21.

46. *Janardhan Reddy v. State of Hyderabad*, A. I. R. 1951 S.C. 217.

47. *R. v. Morn Mill Camp: Ex parte Ferguson*, (1917) 1 K.B. 176.

48. *Raman Lal v. Commr. of Police, Calcutta*, A.I.R. 1952 Cal. 26.

49. *Re Parker Canadian Prisoner's case*, (1889) 151 E.R. 15.

50. *Mool Chand v. Emperor*, A.I.R. 1948 All. 281.

51. *In re Jagerdeo*, A. I. R. 1952 Bom. 139.

So also is it the case of detention under extradition laws.⁵² No person under contempt of court can escape the committal or the sentence by resort to *Habeas corpus*.⁵³ Detention under court-martial also cannot be so questioned. Conviction cannot be questioned regarding its validity but the validity of the order or warrant of commitment may be tested by a writ of *Habeas corpus*.⁵⁴ Detention in military camp, if illegal, can be questioned. But internment is not detention and so no *Habeas corpus* lies, nor can Sec. 491, Cr.P.C., be invoked. But appropriate directions or orders can be issued in this respect under Articles 32 and 226. Detention in private custody,⁵⁵ custody of minors⁵⁶ can be remedied by a writ for *Habeas corpus*. Detention in a lunatic asylum, if illegal, can be questioned by a *Habeas corpus* writ.

Art. 226 only mentioned some of the powers which, if law made by Parliament or other appropriate legislature so provides, may be exercised by the High Courts under circumstances and conditions prescribed by such law. But so long as this is not done, the powers conferred under Art. 225 must remain ineffective except in so far as they can be exercised under the existing law. The High Court however has no power to entertain petitions for *Habeas corpus* under Art. 226 apart from Sec. 491, Cr.P.C.⁵⁷

Article 32 Clause (3)

By this clause Parliament is enabled to empower any other court (other than the Supreme Court which is already vested with such power under Art. 32 clause [2]) to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

The words 'any other court' can only mean any other court than the High Court for read along with Art. 247 they can only mean any court other than a High Court because when the High Courts have already been invested with powers under Art. 226, those words cannot manifestly refer to a High Court.⁵⁸ Looking at the phraseology of Art. 226 the words 'notwithstanding anything in Art. 32' is not mere redundancy. It can only mean that in spite of the provisions of Art. 32 every High Court shall be empowered to issue the writs of the sort specified in the article.⁵⁸ The words 'any other purpose' in Art. 226 also mean nothing more than any other purpose ancillary to the enforcement of any of the rights conferred by Part III of the Constitution. They could not obviously mean 'for the enforcement of any legal right and the performance of any legal duty'.⁵⁸

But the power of the High Court to issue writs cannot be in derogation to that of the Supreme Court, *vide* Art. 226 (2). In other words, an order under Art. 32 will supersede the orders of the High Court previously passed. Subordinate courts can also be empowered under Art. 32 to issue writs, *i.e.* in respect of enforcement of only fundamental rights. Art. 226 contains no such provision of delegation of such rights. Under Art. 226, rights other than fundamental rights can also be enforced. Parliament can also endow the Supreme Court with such power under Art. 139, but unless that is done, as

52. *Hadibandhu Padhan v. Emperor*, A.I.R. 1946 Pat. 196.

53. *Burdett v. Abbott*, (1811) 14 East 1: 104 E.R. 501.

54. Halsbury's 'Laws of England,' 2nd Ed. Vol. 9, 714.

55. *R. v. Home Secretary: Ex parte O'Brien*, (1923) 2 K.B. 361.

56. *Annie Besant v. Narayanlal*, A.I.R. 1914 P.C. 41, following *Lyons v. Blankin*, 37 E.R. 842.

57. *Anant Bhaskar v. State*, A.I.R. 1950 M.B. 60, overruling A.I.R. 1950 M.B. 46.

58. *Govind Prasad Srivastava v. State of Bhopal*, A.I.R. 1952 Bhopal 1.

it is the Supreme Court's jurisdiction to issue writs, is more circumscribed than that of the High Courts.

Art. 247 gives power to Parliament to provide for the establishment of certain additional courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

Article 32 Clause (4).

This is the suspension clause of Art. 32 whereby the right to move the Supreme Court under Art. 32 is suspended. But this suspension of constitutional redress can only be as provided under the Constitution viz. per Article 359.

Art. 359 declares:

(1) Where a proclamation of emergency is in operation the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall as soon as may be after it is made, be laid before each House of Parliament.

The rights under Part II of the Constitution cannot be curtailed by the executive. The right to move under Art. 32 is specific and is not left to legislative control. But emergencies of State policy may dictate suspension of these rights.

It may be noted Art. 358 provides for the suspension of the provisions of Article 19 during emergencies. Hence during the proclaimed emergency the state's power to make any law or to take any executive action is not at all limited by the operation of Article 19. But such statutes or orders will cease to have effect once the period of emergency is over. There is also the general powers of amendment under Art. 368 even in respect of fundamental rights. Article 32 (4) refers only to suspension and not to amendment.

Rules of Supreme Court governing Article 32.

Order 35 Rules 6 to 10 of the Supreme Court Rules provide for the procedure to be adopted for a motion under Art. 32. They read:

Rule 6 :

An application for a direction or order or writ in the nature of *mandamus*, prohibition, *certiorari* or *Quo warrant* shall be filed in the Registry and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by an affidavit verifying the facts relied on, and at least six copies of the said statement and affidavit shall be lodged in the Registry of the Court. The application shall be made by notice of motion.

Rule 7 :

Such application shall be heard by a Division Court, except in vacation when it may be heard by a single judge. Unless the Court otherwise directs, there shall be at least eight clear days between the service of notice of motion and the day named therein for the hearing of the motion.

Rule 8 :

Copies of the said statement shall be served with notice of motion and every party to the proceedings shall supply to any other party on demand and on payment of the proper charges, copies of the said affidavits.

Rule 9 :

The notice shall be served on all persons directly affected and such other persons as the Court may direct:

Provided that on hearing of any such motion, any person who desires to be heard in opposition to the motion, and appears to the court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of motion and shall be liable to costs in the discretion of the court if the order shall be made.

HABEAS CORPUS AND COGNATE WRITS.

The right to constitutional remedies for the loss of liberty of the person has been restated in Articles 32 and 226 of the Constitution of India. In fact, Art. 32 covers remedies for enforcement of any of the rights conferred by Part III of the Constitution, in the Supreme Court. Art. 226 applies to the High Courts of India not only in respect of fundamental rights covered by Part III of the Constitution but also for any other purpose. Though it is germane for a study of remedies in case of detention to confine to writs affecting personal detention only, we shall take this occasion to generally deal with the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, etc.

Origin and Nature of prerogative writs.

The ancient source of these writs can be traced into the common law of England. The King was from time immemorial considered as the fountain or source of justice from whom flowed certain extraordinary Royal prerogatives giving extraordinary remedial protection to the subjects in the realm of their personal liberty. In latter days the King's Bench in which the Sovereign was always deemed to be present in contemplation of the law issued such prerogative writs on 'cause shown'. Writs of right in the nature of *habeas corpus* and prohibition on proper cause being shown were available to the subject *ex debito justitiæ*. Writs like *quo warranto*, *mandamus* and *certiorari* rested more on the discretion of the courts depending on various other factors, such as the conduct of the applicant, consequences of the issue of writ on the rights of others, the immediate necessity for the writ, etc. The jurisdiction of the King's Bench derived from the ancient *Curia Regis*, was subsequently vested in the High Court of Justice under the Supreme Court of Judicature Consolidation Act, 1925 (*vide* Sec. 18). There can be no curtailment of this *Royal Prerogative of Writs except by an Act of Parliament*.

The very term 'prerogative' connotes absence of limitations and the Privy

Council upheld in two cases this prerogative where statutes failed them in the matter of a right to appeal.⁵⁹

The advent of British rule in India brought with it the importation of the machinery of English administration of justice. The original Supreme Courts in Calcutta, Madras or Bombay as well as their successors the High Courts assumed the Royal prerogatives by virtue of their Charter and thus exercised the same powers as was done by the King's Bench and the Supreme Court of England. At first these units were confined to issue of writs within the limits of the Presidency towns but on the analogy of the Supreme Court of England later exercised such powers over British subjects even outside Presidency Towns. There was some conflict of decision regarding Indian subjects outside these Presidency Towns between the Madras and Calcutta High Courts which was resolved by the Privy Council in *Ryots of Garabundho v. Zamindar of Parlakimed*;⁶⁰ which negated the High Court's power to issue writs outside the Presidency Town. However, we have statutory provisions in Sec. 491, Criminal Procedure Code, for a writ in the nature of *Habeas corpus* to the whole of the Province. Sec. 45 of the Specific Relief Act affords writ of *mandamus* to the Presidency Towns. But these fall short of the writs as obtaining in England. Thus it is only after the Constitution of India was passed we have in ample measure a guarantee of these prerogative writs in Arts. 32 and 226. With these articles in force Sec. 491, Cr. P. Code, and Sec. 45, Specific Relief Act, are of no practical importance. We are more than abreast of the English law, after the enforcement of Arts. 32 and 226. For now the High Courts in each State of India under Art. 226 can not only issue prerogative writs as in England but can also issue orders or directions of the nature of those writs or otherwise for the purpose of enforcement of the fundamental rights or even any violation of other justiciable right.

Writ of Habeas Corpus: Nature of.

This ancient English writ is unique and as against this Royal prerogative there can be no privilege or right claimed by any person whatsoever. It was an answer to illegal imprisonments and detentions by the Crown or the Executive.⁶¹ By successive Acts of Parliament in 1640, 1679 and 1866 the writ of *habeas corpus* has been perfected and it is the general remedy against unlawful imprisonment. A *prima facie* case is however necessary to move the Court for issue against the custodian of a *Rule Nisi*, i.e., a rule to show cause and also a call to 'take the body' (*Habeas Corpus*) before the Court on a certain day. This writ is more fully described as '*habeas corpus ad subjiciendum*' addressed to the person having the custody of the person in question to produce the body of the prisoner with the day and cause of his capture and detention *ad faciendum subjiciendum et recipiendum*, to submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.⁶² The writ is not punitive but only remedial. The detainer is not punished but the detained is released.⁶³ The writ can emanate only *ex debito Justitiæ* on cause shown.⁶⁴ The net result of *habeas corpus* procedure is that no

59. *King Emperor v. Vimla Bai*, A.I.R. 1946 P.C. 123 (appeal against an order under Sec. 491, Cr.P.C.); *Delhi Cloth and General Mills Co. v. Income-Tax Commissioner*, A.I.R. 1927 P.C. 242 (Income-tax appeal).

60. I.L.R. (1944) Mad. 556.

61. See *Darnell's case*, (1627) 3 State Tr. 1.

62. Blackstone's 'Commentaries', 131.

63. *Barnardo v. Ford Gassage's case*, (1892) A.C. 326.

64. *Hobhouse's case*, (1820) 3 B. & Ald. 420.

person can be kept in confinement for long since he has the legal means of insisting that either he should be let out on bail or brought to a speedy trial.

While the writ of *Habeas corpus* is an effective remedy to protect the individual from unlawful imprisonment and detention, the writ of *Mandamus* is a peremptory order issued to public officers or bodies to do some particular things as appertains to their office or duty. A writ of Prohibition however works in the opposite direction and is used to forbid an excess of legal powers. A writ of *certiorari* is generally issued to remove a suit from an inferior Court to a superior Court to secure a fair trial or to prevent a Court from exceeding its jurisdiction. *Quo warranto* is a writ directed to persons who had improperly assumed an office or privilege belonging to the Crown. In England the Administration of Justice Act, 1938, now enables the High Court to grant an injunction to restrain a person from acting in a public office to which he is not entitled.

Section 491, Cr. P. Code.

The power to issue directions of the nature of *Habeas Corpus* is enunciated in Sec. 491, Cr.P. Code, which runs thus:

“(1) Any High Court may whenever it thinks fair direct—

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;

(c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be enquired into before such court;

(d) that a prisoner detained as aforesaid be brought before a court-martial or any commissioners for trial or to be examined touching any matter pending before such court-martial or commissioners respectively;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial, and

(f) that the body of a defendant within such limits be brought in on the Sheriff's return of '*Cepi Corpus*' to writ of attachment.

(2) The High Court may from time to time frame Rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation 1818, Madras Regulation II of 1819 or Bombay Regulation XXV of 1827 or the State Prisoners Act, 1800, or the State Prisoners Act, 1858.”

If common law rights exist outside Sec. 491.

There was once a doubt if the High Court could issue any writ of *Habeas corpus* apart from the provisions of this code⁶⁵ though the Madras and Bombay High Courts held a contrary view;⁶⁶ a later Full Bench of Madras⁶⁷

65. *Girindra Nath v. Birendra Nath*, A.I.R. 1927 Cal. 496.

66. *Mahamad Ali Allabax v. Ismailji*, A.I.R. 1926 Bom. 332; *Govindan Nair v. Emperor*, A.I.R. 1922

Mad. 199: I.L.R. 45 Mad. 922.

67. *District Magistrate, Trivandrum v. K. C. Mammen Mapillai*, A.I.R. 1939 Mad. 120: I.L.R. (1939) Mad. 708 (F.B.).

overruled the earlier decisions stating the High Court had no such power. Ultimately, the Privy Council reaffirmed the Madras Full Bench view in *C.P. Mathen v. District Magistrate, Trivandrum*,⁶⁸ and stated that the High Courts had no jurisdiction to issue the common law writ of *Habeas corpus* in cases falling within the ambit of Sec. 491, Cr. P. Code, and as Sec. 491 permits the High Court to issue such writs within its appellate jurisdiction, the common law of power *Habeas corpus* must be deemed to have been impliedly taken away. The Privy Council quoted the Full Bench words: "The High Courts Act of 1861 authorised the Legislature if it thought fit to take away the powers which this court obtained as successor of the Supreme Court and Acts of Legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the Legislature has taken away the power to issue the prerogative writs of *Habeas corpus* in matters contemplated by Sec. 491, Cr. P. Code of 1898."

Burden of Proof.

As pointed out in *King v. Greenhill*,⁶⁹ *Habeas corpus* proceeds on the fact of an illegal restraint. So the illegality of the restraint has to be shown *prima facie*. The initial onus and burden of proof is on the Government to show the legality of the detention. When the Crown produces such a record—a legal order of detention, the onus then shifts on to the detenu to prove all facts necessary to show that the detention was illegal. Thus in *Wasudeo Anant v. Emperor*,⁷⁰ it was postulated that to displace the presumption of the legality of a detention order the detenu could show that there had been a mistaken identity or fraud on the statute or other misuse of the power.

Where Habeas Corpus could be used.

The writ of *Habeas corpus* is available as against any unlawful detention, civil or criminal in nature. It may include various categories⁷¹ such as:

- (i) Illegal arrest, wrongful imprisonment by State of a private individual;⁷²
- (ii) Wrongful or illegal detention of infant or ward;⁷³
- (iii) Wrongful or illegal detention of wife;⁷⁴
- (iv) Wrongful or illegal detention of lunatic;⁷⁵
- (v) Wrongful detention under extradition warrant;⁷⁶
- (vi) Detention of a slave;
- (vii) Detention of any other person illegally or without just cause.

68. I.L.R. (1939) Mad. 744: A.I.R. 1939 P.C. 213.

69. (1836) 4 A. & E. 624 (639 to 642) cited in 16 Bom. 307.

70. A.I.R. 1949 Nag. 50: I.L.R. (1948) Nag. 488.

71. Vide N. R. Raghavachari's 'Constitution of India', p. 152.

72. *Darnel's case*, (1627) 3 State Tr. 1.

73. *Rex v. Greenhill*, (1836) 4 Ad. & El. 624; *Rama Ayyar v. Nataraja Ayyar*, A.I.R. 1948 Mad. 294; *Queen v. Clarke*, 7 E. & B. 186 cited in *Reade v. Krishna*, I.L.R. 9 Mad. 391; *Saraswathi*

Ammal v. Dhanakoti Ammal, A.I.R. 1924 Mad. 873: I.L.R. 48

Mad. 299; *Annie Besant v. Narayaniah*, A.I.R. 1914 P.C. 41: I.L.R. 38 Mad. 807.

74. *Subbusamy v. Kamakshi*, A.I.R. 1929 Mad. 834; *Rex v. Legatt*, 18 Q.B. 671; *Rex v. Jackson*, (1891) 1 Q.B. 671.

75. *Ex parte Child*, (1854) 15 C.R. 238; *R. v. Wright*, (1760) 2 Burr. (1100).

76. *R. v. Brixton Prison (Governor)* *Ex parte Calberla*, (1907) 2 K.B. 861; *Saksena v. State*, 1950 S.C. 155: 1950 M.W.N. 727.

Procedure in habeas corpus (Sec. 491, Cr. P. Code).

Any person interested in the detenu may apply, as friend,⁷⁷ relation, a wife,⁷⁸ husband,⁷⁹ father,⁸⁰ sister,⁸¹ parent,⁸² or guardian.⁸³ A mere stranger or volunteer may not apply except where he could file an affidavit showing the detenu was coerced or otherwise forced against making an affidavit by himself.⁸⁴

An application and an affidavit showing the grounds for release should be filed. The order of the judge may be made either on notice to the opposite party or without notice or if the writ will be defeated by giving of notice the court can even make the order absolute *ex parte*.⁸⁵ If notice is ordered both parties will be heard and final orders passed. Any disobedience to a writ order is punishable as contempt of Court.⁸⁶ The application should ordinarily be made without delay. Needless delay will be a ground for refusal of a writ.⁸⁷ The withholding of petitions for release addressed to High Court by the Jail Superintendent is illegal and will be treated as obstructing course of justice;⁸⁸ under the common law successive applications to the same effect and with the same object are maintainable.⁸⁹ But Rule 8 of the Allahabad High Court Rules forbids second application and the view of the Bombay and Nagpur High Courts are the same⁹⁰ though Punjab takes a contrary view.⁹¹ The Rules made by the various High Courts govern the matter. An order under Sec. 491 is no bar to other remedies.⁹² No costs can be granted in an application under Sec. 491, Cr. P. Code.⁹³ After the 1919 Amendment of the Letters Patent no appeal lies from any order passed by a single judge of the High Court in criminal jurisdiction. Hence no appeal lies against an order under Section 491 which is a matter pertaining to criminal proceeding. But after the decision of the Privy Council in *C. P. Mathen's case*⁹⁴ the prerogative of the Crown exists in the matter of writs to hear in appeal even where no appeal is provided.

In view of the provisions of Articles 226 and 32 of the Constitution the power of issuing writs of *Habsas corpus*, etc., may now be stated to be self-contained therein. In that sense, Sec. 491 of the Criminal Procedure Code may now be regarded as superseded. As stated in the matter of *Venkateswaralu*,⁹⁵ Art. 226 has superseded all provisions of the Cr.P. Code which gave power and authority to the High Court to issue writ in the nature of *Habeas corpus*.

77. *Ashby v. White*, (1704) 14 State Tr. 695 H.L. at p. 825.

78. *Ex parte Cobbett*, (1851) 15 Q.B. 182.

79. *R. v. Brooke & Fladgate Gregory* (1766) 4 Burr. 1991.

80. *Re Thompson*, (1896) 30 L.J. M.C. 19.

81. *Re Daley*, (1860) 2 F. & F. 258.

82. *Re Harper*, (1895) 2 I.R. 571.

83. *Ex parte Child*, (1854) 15 C.B. 238; 139 E.R. 413.

84. *Ex parte Child*, *Ibid*.

85. *Ex parte White*, (1853) 2 E. & B. 717, 734.

86. *Re Fitz*, (1872) 61 R.C.L. 507.

87. *In re Amritalall Day*, I.L.R. 1 Cal. 78.

88. *Laxman Prasad v. U.P. Government*, A.I.R. 1946 Oudh 183; *Homi Rustojji v. Sub-Inspector Baig*, A.I.R. 1944 Lah. 196;

Baldeo Mitter v. Emperor, A.I.R. 1944 Lah. 142.

89. *Eshugbayi Eleko v. Officer, Administering Government of Nigeria*, A.I.R. 1928 P.C. 300; *In re Haridas*, A.I.R. 1949 Nag. 201.

90. *In re Haridas*, *Ibid*; *Malhari Ramji v. Emperor*, A.I.R. 1948 Bom. 326.

91. *Ramjilal v. Rex*, A.I.R. 1949 E.P. 67.

92. *Siva Jay Teong v. Boun Lay*, A.I.R. 1926 Rang. 76.

93. *Rammammal v. Vijayaraghavalu Naidu*, A.I.R. 1933 Mad. 102.

94. A.I.R. 1939 P.C. 213.

95. *P. Venkateswarlu, a detenu in the Central Jail at Cuddalore v. Dt. Magistrate Guntur and Superintendent, Central Jail, Cuddalore*, A.I.R. 1951 Mad. 269.

Application for writ can be made by person other than the detenu, but he should have a definite tangible interest in the detenu. In *Chiranjit Lal's case*,⁹⁶ Das, J., opined, "The proceedings for a writ in the nature of a writ of *Habeas Corpus* appear to be somewhat different, for the Rules governing those proceedings permit besides the person imprisoned, any person, provided he is not an utter stranger, but is at least a friend or relation of the imprisoned person, to apply for that particular writ. But the special rule does not appear to be applicable to the other writs which require a direct and tangible interest 'in the applicant to support his application'." The jurisdiction to issue a writ is determined on the basis of circumstances obtaining at the time when the application is made, that is when the impugned order was made⁹⁷ because illegal detention is a continuing wrong.

If there has been a conviction on a criminal charge by a Court which had no jurisdiction that is no ground for a *Habeas corpus* proceeding as that is detention in execution of a sentence after a trial. If the trial is vitiated for want of jurisdiction the remedy is appeal and not a *Habeas Corpus* writ under Article 32.⁹⁸ As to when preventive detention can be resorted to and on what grounds an order of detention can be questioned successfully has been fully dealt with in the previous chapter.

Articles 32 and 226 of the Constitution.

These articles of the Constitution which comprise the entire law on prerogative writs run thus:—

RIGHT TO CONSTITUTIONAL REMEDIES.

Art. 32. Remedies for Enforcement of Rights conferred by this part.

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part (Part III) of the Constitution is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders of writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
- (3) Without prejudice to the powers conferred on the Supreme Court by cls. (1) and (2) Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
- (4) The Right guaranteed by this article shall not be suspended except as otherwise provided by the Constitution.

Art. 226. Power of High Court to issue certain writs.

- (1) Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it

96. 1950 S.C.R. 869 at 930: 1951

S.C.J. 29: A.I.R. 1951 S.C. 91.

97. *Janardhana Reddy v. State of*

Hyderabad, 1951 S.C.R. 344.

98. *Ibid.*

exercises its jurisdiction, to issue to any person or authority including in appropriate cases any Government, within those territories, directions, orders, or writs including writs in the nature of *Habeas Corpus*, *mandamus*, prohibition, *quo warranto* and *Certiorari* or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose.

- (2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Art. 32.

Scope of Article 32.

The ambit of Article 32 can be summarised thus:—

1. The only object of the article is the enforcement of the guaranteed fundamental rights under Part III of the Constitution.

2. No matter whether the necessity arises out of an executive action or action of the legislature, Art. 32 can be utilized to enforce the fundamental right in either event.

3. The constitutional validity of a legislative enactment does not arise directly under Art. 32. It is enough for the applicant to (a) establish that the impugned law is beyond the legislative competency covered by any of the items in the legislative lists and (b) that it also affects or invades the guaranteed fundamental rights of which he is now seeking enforcement.

4. Art. 32 is not in the nature of a declaration suit. So a declaration that an impugned Act is invalid followed by the consequential prayer for relief by way of injunction are not at all germane to an application under Art. 32.⁹⁹

5. Any person aggrieved can apply under Art. 32 including corporate bodies where that is the person aggrieved and where it is not otherwise prohibited. Only rights of the petitioner can be investigated except in the case of *Habeas corpus* where not only the man in detention or imprisonment but also any person interested in him, not being an utter stranger, can apply.¹⁰⁰

6. The powers extended to the Supreme Court under Art. 32 are not confined to issuing of prerogative writs only and are not necessarily circumscribed by the conditions which limit the exercise of the prerogative writs.

7. The remedial right vouchsafed under Art. 32 is by itself a fundamental right as it is included in Part III of the Constitution. So it is mandatory on the Supreme Court to hear all such applications and afford the protection in all valid cases.¹ No application can be thrown out for want of proper prayers. The court has ample discretion under the Article to grant the necessary relief even when it is not properly prayed for.¹⁰⁰ If *mandamus* is prayed for the Court can grant it in a different form.

8. An application under Art. 32 always first lies to the Supreme Court, since Art. 32 is itself a fundamental right. It is a substantive right, not a mere procedural right. There is no need or warrant to resort under Art. 226

99. *Chiranjit Lal v. Union of India*,
1950 S.C.R. 869: A.I.R. 1951 S.C.
41.

100. *Chiranjit Lal v. Union of India*,

1950 S.C.R. 869: A.I.R. 1951 S.C.
41.

1. *Rashid Ahmed v. Municipal
Board*, (1950-51) C.C. 61 (63).

to the High Court before approaching the Supreme Court under Art. 32.² The question remains whether, if after an application has been disposed of under Art. 226 by the High Court, a similar application can be filed under Art. 32 to the Supreme Court. In one case *Aswiri v. Arabinda*,³ the Supreme Court left the question open and proceeded on the footing of hearing an appeal from the order under Art. 226. But in an Assam case⁴ such a right was recognised as coming under Art. 32.

(9) As Art. 32 is a mandatory fundamental right by itself any law which renders nugatory or illusory the exercise of the Supreme Court's powers under Art. 32 is indeed void.⁵

(10) Existence of alternative remedy is no bar for refusing a writ under Art. 32 since the Supreme Court's powers are wide and are not confined to issuing prerogative writs only.^{5a}

(11) Clause (3) of Art. 32 mentions empowering 'other courts' also. 'Other courts' obviously refer to courts other than High Courts as the latter are given specific powers under Art. 226.⁶ Subordinate courts may thus be invested with powers under Art. 32.

(12) While under Art. 226 High Courts have also power to issue writs for purposes other than enforcement of fundamental rights, Art. 32 restricts the Supreme Court's jurisdiction to only 'fundamental rights'. But Art. 139 empowers Parliament to legislate and grant such power to the Supreme Court.

Contempt in Habeas Corpus proceedings.⁷

An order of *Habeas Corpus* has to be respected as mandatory. Any refusal to give effect to it is gross contempt of Court.⁸ Any reference wilfully so done within the jurisdiction of the Court or the Supreme Court in *Habeas Corpus* proceedings also amounts to contempt.⁹ Any application forwarded by a detenu if withheld from or delayed in transit to the Court the offending officer is liable for contempt.⁹

When Habeas Corpus does not lie.

No *Habeas Corpus* application can lie—

1. When the person in confinement is so imprisoned consequent on sentence of punishment in a criminal case. This will be so even if the convicting court had no jurisdiction to try. A court has the right to decide rightly or wrongly. This can be questioned only in appeal. Where the appellate court decided in favour of the jurisdiction of the lower court that order has to be respected and cannot be treated as a nullity in a *Habeas Corpus* proceeding.⁸

2. *Ramesh Thappar v. State of Madras*, A.I.R. 1950 S.C. 124: 5 D.L.R. 42 (S.C.).

3. 1952 S.C.J. 568: A.I.R. 1952 S.C. 369.

4. *Himanshu Bimal Mitra v. State*, A.I.R. 1951 Assam 143: I.L.R. (1951) Assam 42.

5. *Gopalan v. State of Madras*, 1950 S.C.R. 88: (1951) 6 D.L.R. 313.

5a. *Rashid Ahmad v. Municipal Board* (1950-51) C.C. 61 (63).

6. Cf. *Govind v. State of Bhopal*,

A.I.R. 1952 Bhopal 1 (3).

7. See 'Law of Contempt of Court' by the author (M.L.J. edition).

8. *State v. Samnath*, A.I.R. 1953 Orissa 33.

9. *Jyotirmoy v. Govt. of West Bengal*, A.I.R. 1952 Cal. 562; *Janardhan v. State of Hyderabad*, 1951 S.C.R. 344; *Narayan v. State of Punjab*, 1952 S.C.R. 395: 7 D.L.R. 148 (S.C.): 1952 S.C.J. 111.

2. The legality or otherwise of the detention at the time of the return alone matters in a *Habeas Corpus* proceeding, not the date of the institution of the proceeding. So an initial defective order can be checkmated by a fresh valid order of detention by the time of the return of the writ.¹⁰

Appeals in Habeas Corpus proceedings.

In England no appeal lies from an order ordering release in a *Habeas Corpus* proceeding. There is no such absolute immunity in India. Under the Constitution an appeal lies both from the order of allowing or refusal in a *Habeas Corpus* matter. Thus under Art. 132 (1) upon a certificate granted by the High Court, an appeal lies to the Supreme Court, if it involves a constitutional question. When no such question is involved, even then there can be an appeal under Art. 134 (1) (c) upon the certificate of the High Court. But such certificates are not given as a matter of course particularly to imperil an order of release.¹¹ A certificate will not be granted unless there is a substantial question of law of paramount public importance involved in the case.¹²

Art. 32 guaranteed but not Art. 226.

While the right to move the Supreme Court under Art. 32 for the enforcement of fundamental right is guaranteed such a right is not guaranteed under Art. 226 although the High Court has a wider field assigned to it in that it can issue writs for the enforcement of any of the fundamental rights conferred by Part III as well as for any other purpose. No provision corresponding to Art. 32 (2) finds a place in Art. 226.¹³ Art. 226 is, however, wider in its application, but nevertheless it should not be abused for giving what is in essence a declaratory relief.¹⁴

The scope of Art. 32 is however restricted to enforcements of only fundamental rights.¹⁵ In *Habeas Corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings.¹⁶ Detention of a person in custody after the expiry of remand order without any fresh order of remand committing him to further custody, while adjourning the case under Sec. 344, Cr. P. Code, is illegal.¹⁶ When the lawfulness or otherwise of the custody of the person concerned is in question, the documents containing order of remand would be of vital importance and should be produced at the time of filing the return.¹⁶ When a *Habeas Corpus* petition has been rejected on merits the case cannot be reopened on constitutional points or that the grounds of detention are vague.¹⁷

WRIT OF MANDAMUS.

Mandamus is a high prerogative writ resorted to in all cases (1) where there is a specific legal right without there being a specific legal remedy for

10. *State of Punjab v. Ajai Singh*, (1952) S.C.A. 791: 8 D.L.R. 35 (S.C.): A.I.R. 1953 S.C. 10.

11. *Tarapada v. State of West Bengal*, A.I.R. 1951 S.C. 174: 6 D.L.R. 235.

12. *Public Prosecutor v. Gopalan*, A.I.R. 1953 Mad. 66 (70).

13. *B. B. L. Railway v. District Board*, A.I.R. 1952 Pat. 23; I.L.R. 30 Pat. 27.

14. *Maqbulunissa and another v.*

Union of India, A.I.R. 1953 All. 47 (F.B.).

15. *Nain Sukh Das v. The State of U.P.* A.I.R. 1953 S.C. 384.

16. *Ramnarayan Singh v. The State of Delhi*, 1953 S.C.R. 652: 1953 S.C.J. 326.

17. *Mrs. Godavari W/o Sham Rao V. Parulekar v. State of Bombay*, A.I.R. 1953 S.C. 52: 8 D.L.R. 83 (S.C.).

its enforcement in the interests of justice and (2) in the nature of command to any person, corporation or tribunal to do a thing which appertains to his office, the body or tribunal as the case may be and which is in the nature of a public duty.¹⁸ Under Art. 226 *mandamus* can be addressed to corporation, inferior court or Government.

The word '*mandamus*' itself means a 'command' and is used when the inferior tribunal had declined jurisdiction and so the order compels that body to act. But *certiorari* and prohibition step in those cases where there has been a wrong or excessive exercise of jurisdiction and the order commands 'inactivity'. While *mandamus* is against any public authority including administrative and local bodies, the other two writs referred to apply only to indirect and quasi-judicial bodies. There is not much difference between the writs of *certiorari* and prohibition except that the latter may be issued at an earlier stage. The object of 'prohibition' is prevention while *certiorari* both prevents and cures. The latter steps in when usurpation of jurisdiction is a *fait accompli* while prohibition is used when that has not yet taken place.

While *mandamus* is a command to a public officer to do his duty, *quo warranto* is against an usurper officer to show his credentials of office.

A writ of *mandamus* can be issued only if the following conditions¹⁹ are satisfied:—

(a) that the applicant has a legal right to the performance of a legal duty (not discretionary) by the person against whom the writ is sought.²⁰

(b) The right must be a public right²¹ and the duty to be enforced is of a public nature (in contradistinction to private disputes).

(c) The applicant must possess in himself solely or in common with others the legal right to compel performance of the duty.²² Mere 'interest in the performance of the duty' is not sufficient.

(d) The aggrieved party must apply. The party in whose favour the impugned order was made cannot obviously resort to *mandamus*.

(e) The application should be in good faith²³ and not for an indirect ulterior purpose or on behalf of a third party.

(f) The party against whom *mandamus* is sought should have refused to act so as to give cause of action for the aggrieved party to move for a writ of *mandamus*.²⁴

(g) There should be no other equally effective and convenient remedy available.²⁵

(h) The remedy by writ of *mandamus* must result in benefit to the applicant. The writ will be refused where the person against whom it is prayed has no

18. *Rex v. Inland Revenue Commissioners Re Nathan*, (1884) 12 Q.B.D. 461.

19. *Cf. Carlsband Mineral Water Co. v. Jagtiani*, A.I.R. 1952 Cal. 345.

20. *R. v. Lawisham Wrion*, (1897) 1 Q.B. 498.

21. *R. v. Bank of England*, (1819) 2 B. & Ald. 620. *

22. *R. v. Petersborough Corporation*, (1875) 44 L.J.Q.B. 85.

23. *Ibid.*

24. *Sandhi v. Att. General*, 1952 Punj. 351; *Union of India v. Elbridge*, A.I.R. 1952 Cal. 601 (606).

25. *Per Hill, J., in re Barloo Rector of Evehurst*, (1861) 30 L.J.Q.B. 271.

power of compliance²⁶ or where no resultant benefit will accrue to the applicant.²⁷

The writ of *mandamus* is to enforce a legal duty on the part of the concerned officer. It must not be a duty which is not mandatory. If the duty to be done is not legal but left to the discretion of the officer,²⁸ no *mandamus* can be issued, as there is no compelling duty or obligation on the part of the officer to perform the act required of him. The words used in the statute are 'it shall be lawful'. This does not mean 'discretionary'. No *mandamus* can be against the 'Crown' as the Crown never personally does any act nor can it be punished for disobedience as it is immune from the process of attachment. The disobedience of a writ of *mandamus* is punishable as contempt by attachment. A motion for a writ of *mandamus* is made by an application supported by an affidavit detailing a *prima facie* case. The affidavit cannot be later amended unless the Court is satisfied grave injustice will result.²⁹ On the notice to show cause the respondent or any other person can show against the issue of a writ. If good cause is shown the order *nisi* is discharged. Else it will be made absolute. Once a writ application is dismissed a second application supported by a fresh affidavit containing fresh particulars, is not permissible as it is incumbent that the first affidavit itself should give all the particulars.³⁰ A writ for *mandamus* may be refused when the act complained of is completed and the writ will be infructuous,³¹ or where the writ will be impossible of performance and will be futile,³² or where there is laches on the part of the applicant,³³ or where an indirect attempt is made to settle title to the property,³⁴ or complicated questions of fact exist or where the writ is sought not to enforce statutory duty of a public servant but to enforce a contract independent of such duty,³⁵ or where it is against ministerial officers³⁶ (in contradistinction to Government officers and departments).

Existence of alternative remedy to *mandamus*.

In England an alternative remedy if available which is not 'less convenient' beneficial and effective' completely bars recourse to a writ of *mandamus*. In India a distinction can be made as to when *mandamus* is sought to enforce fundamental rights and where it is sought for 'other purposes'. The powers of the Supreme Court and the High Court under Arts. 32 and 226 are not confined to issue of 'prerogative writs'. Wherever it is a question of enforcement of a fundamental right, the Court may while it can consider the adequacy of another legal remedy there is no absolute bar in proper cases to issue a writ of *mandamus*.³⁷ While this is the view of the Supreme Court, ³⁷ in one case³⁸ it has been stressed that in all cases of infringement of fundamental

26. *R. v. Ely (Bishop)*, (1750) 1 Wm. Bl. 52.

27. *R. v. Azbridge Corporation*, (1777) 2 Cowp. 523.

28. *R. v. Lunus E. Commissioners*, (1897) 1 Q.B. 630.

29. *R. v. Plymouth & Dartmore Coy.*, (1889) 37 W.R. 337.

30. *R. v. Bodmin Corporation*, (1892) 2 Q.B. 21.

31. *Ajit Kumar v. S. N. Maitra*, (1952) App. No. 71|51 Cal. (unreported).

32. *Lalchand v. Collector of Sirmur*, A.I.R. 1952 H.P. 16; *Amar v. Government of Pepsu*, A.I.R.

1953 Pepsu 58.

33. *Ajit Kumar v. S. N. Maitra*, (1952) App. No. 71|51 Cal. (unreported).

34. *Samarendra v. University of Calcutta*, A.I.R. 1953 Cal. 172.

35. *Carlsband Co. v. Jagtiani*, A.I.R. 1952 Cal. 315; *Dubar v. Union of India*, A.I.R. 1952 Cal. 496.

36. *R. K. Choudhry v. Collector*, A.I.R. 1952 H.P. 16.

37. *Rashid Ahmad v. Municipal Bennion*, (1914) 3 K.B. 349.

38. *C. V. Transport v. State of H.P.*, A.I.R., 1953 H.P. 8.

rights the only remedy prescribed is as under Arts. 32 and 226 and that there is no question of any alternative remedy. Where the alternative remedy is not equally convenient or effectual³⁹ or where the executive authority issuing the impugned order had not applied its mind to the question whether the conditions which gave him jurisdiction were satisfied⁴⁰ or where there is a right of appeal but the law itself does not provide the remedy by which an infringement of a fundamental right is to be remedied⁴¹ in all such cases a writ of *mandamus* does lie despite alternative remedies.

But where it is not a case of fundamental rights but it is a case of 'other purposes' the English rule can be applied and *mandamus* will be refused where there is an alternative remedy. Thus no *mandamus* lies to correct an irregularity or error in a judgment which can be so done in appeal or revision⁴² or where a civil action is available.⁴³

But in *Chhotabhai v. State of M.P.*,⁴⁴ the Supreme Court held that where the State sought to interfere with vested contractual rights under cover of a legislation called the Madhya Pradesh Abolition of Proprietary Rights Act, 1950, which was not retrospective, the Supreme Court could relieve by a writ of *mandamus* prohibiting the State from interfering with the possession of the petitioners who had pre-existing contracts in respect of trees, timber etc., and which were not affected by the Act. If a remedy by way of appeal lies in law against an order *mandamus* is not the appropriate remedy under Art. 226 unless the applicant can show that such an alternative remedy would not be so convenient, beneficial and effective or that Court's guidance is necessary to make the authorities discharge their duties properly.⁴⁵ *Mandamus* will certainly lie when filing of an appeal is rendered difficult or impossible on account of the impugned order containing no reasons for refusal⁴⁶ or when there is no 'order' as such⁴⁷ or where the matter is kept unduly pending without passing of any order⁴⁸ or where there was no proper hearing before the impugned order was made⁴⁹ or where no date for hearing of an appeal is fixed at all though only seven days of stay alone had been ordered.⁵⁰ Special leave to appeal under Art. 136 is not an 'alternative remedy' as this extraordinary power is discretionary with the Supreme Court.⁵¹

While *mandamus* can be resorted to where the officer exceeds his power or fails to comply with the conditions imposed under the statute to exercise the power⁵² or where the officer fails to exercise a lawful duty to compel him to do so⁵³ such a writ cannot be utilized to compel an officer to exercise a dis-

39. *Prabhabati v. D. M. Allahabad*, A.I.R. 1952 All. 836.

40. *Bharwad v. State of Saurashtra*, (1952) 7 D.L.R. 52 (Sau.).

41. *Rashid Ahmed v. Municipal Board*, 1950 S.C.R. 566.

42. *Whiswanath v. 2nd Addl. Dt. Judge*, A.I.R. 1951 Nag. 6.

43. *Moti Lal v. Uttar Pradesh*, A.I.R. 1951 All. 257 (F.B.).

44. S. C. Petn. 232 of 1951.

45. *Motilal v. Govt. of Uttar Pradesh*, A.I.R. 1951 All. 257 (F.B.).

46. *Ibid.*

47. *Baghat Transport v. State of*

H.P., A.I.R. 1951 H.P. 36.

48. *Agarwal v. T.R.T.A.* (1952) 7 D.L.R. 44 Raj.; A.I.R. 1953 Raj. 1.

49. *Gayadinam v. A. D. Khan*, (1951) 55 C.W.N. 667.

50. *Rashid Ahmed v. Municipal Board*, 1950 S.C.R. 566.

51. *State of Bombay v. Lakshmidas*, (1952) 54 Bom. L.R. 681.

52. *Ranganadham v. Madras Electric Tramway*, A.I.R. 1952 M. 659.

53. *Shanker v. Returning Officer*, A.I.R. 1952 Bom. 277.

cretion in a particular way.⁵⁴ But if the officer had the duty to exercise a discretion he can be compelled to exercise it in one way or other.⁵⁵

Mandamus can be resorted to :

- (a) to compel public officials or bodies to perform their public duties ;⁵⁵
- (b) to direct such officials not to enforce a law which is unconstitutional;⁵⁶
- (c) to compel inferior courts and tribunals to exercise their jurisdiction, when they have refused to exercise it;⁵⁷
- (d) to compel domestic tribunals, to comply with requirements of natural justice;⁵⁸
- (e) to restore, admit or elect to an office.⁵⁹

No *mandamus* can lie against the President of the Indian Republic, or the Governor or Rajpramukh of a State for the exercise of their respective powers or duties as per Art. 361 nor can an inferior or ministerial office be tied down by a writ of *mandamus* as the former is only bound to obey orders of his higher authorities. *Mandamus* must be directed against the latter writs.⁶⁰

Art. 226 and Specific Relief Act, Sec. 45.

Section 45 of the Specific Relief Act makes provisions for orders in the nature of *mandamus*. But the power to issue directions in the nature of *mandamus* is confined to the ordinary original civil jurisdiction. But under Art. 226 there is no such limitation as it extends to the entire jurisdiction of the High Court. But Sec. 45 is superfluous in the presence of Art. 226. Sec. 50 of the Specific Relief Act provides that nothing in that chapter shall affect the power conferred on the High Court by clause (1) of Art. 226 of the Constitution. Sec. 45, Specific Relief Act, runs thus:—

POWER TO ORDER PUBLIC SERVANTS AND OTHERS TO DO CERTAIN SPECIFIC ACTS.

Sec. 45. Any of the High Court of Judicature at Calcutta, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction by any person holding a public office whether of a permanent or a temporary nature or by any corporation or inferior court of judicature provided—

- (a) that an application for such order be made by some person whose property, franchise or personal right would be injured by forbearing or doing (as the case may be) of the said specific act;
- (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such persons or Court in his or its public character or on such corporation in its corporate character;
- (c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;

54. *Commissioner of Police v. Gorthandas*, 1952 S.C.R. 135.

55. *S. K. Ghose v. Vice-Chancellor*, (1952) 7 D.L.R. 14 Cutt. (Syndicate of Universities) Medical Faculty; *Bejoyranjan v. C. C. Das Gupta*, 1952) 7 D.L.R. 168 (Cal.) (A. State); *Mukund v. Municipal Committee*, (1953) 8 D.L.R. 18 Simla (a municipal committee).

56. *Ramprasad v. State of Bihar*, A.I.R. 1953 S.C. 215.

57. *Jagannath v. D.M.*, A.I.R. 1951 All. 710.

58. *B. C. Das Gupta v. Bijoyranjan*, (1952) 56 C.W.N. 861.

59. *Mangal Sain v. State of Punjab*, A.I.R. 1952 Punj. 58.

60. *In re Babulchandra*, A.I.R. 1952 Pat. 309 (311).

- (d) that the applicant has no other specific and adequate legal remedy;
- (e) that the remedy given by the order applied for will be complete.

Exemption from such power.—Nothing in this section shall be deemed to authorize any High Court—

- (f) to make any order binding on the Secretary of State, the Central Government, the Crown representative or any Special Provincial Government;
- (g) to make any order on any other servant of the Crown as such merely to enforce the satisfaction of a claim on the Crown;
- (h) to make any order which is otherwise expressly excluded by any law for the time being in force.

Special features of 'mandamus'.

Mandamus may be refused in certain cases as the remedy is not mandatory but only discretionary⁶¹. Where the writ will be infructuous⁶² or meaningless due to lapse of time⁶³, or where it is premature no action having been done or proposed to be done as alleged in the petition,⁶⁴ in all these cases the remedy will be refused. It will be so refused also in cases where the order will be impossible of performance. This may be so where the opposite party has not the power to obey⁶⁵, or where the impugned office can be terminated at will⁶⁶ or when the thing ordered cannot be given effect to legally by the party⁶⁷.

The practice in England is that where the alternative remedy is not less convenient, beneficial and effective, *mandamus* will be refused. As the Constitution of India stipulates guaranteed fundamental rights and Art. 32 is itself a guaranteed right, *mandamus* when prayed for under Article 32 or 226 for the enforcement of a fundamental right it shall not be refused⁶⁸. But if it is for 'other purposes' for the enforcement of other rights under Art. 226 it may be refused, as in a case where an error in the judgment which could be corrected in appeal or revision is sought to be remedied by a writ of *mandamus*⁶⁹.

When an adequate remedy by ordinary action in a civil court can be had *mandamus* can be refused⁷⁰. But alternate remedy is no bar when the applicant has no right to pursue it⁷¹ or where it will be ineffective or inadequate⁷². A remedy by appeal bars *mandamus*⁷³, but not if it is less beneficial, convenient and effective⁷⁴. Where it is not possible to prefer an appeal as

61. *Senai Ram v. I. T. Commr.*, A.I.R. 1955 ASS. 201.

62. *Manilal v. Mondad*, (1918) 22 C.W.N. 951.

63. *Gurusamy v. State of Mysore*, A.I.R., 1955 S.C., 592.

64. *Nanda v. Board of Trustees*, A.I.R. (1957 Cal. 578. *E. I. Commercial Co. v. Collector*, A.I.R. 1957 Cal. 606.

65. *Amar v. Govt. of Pepsu*, A.I.R. 1953 Pepsu 58.

66. *Bala Krishan v. State of Punjab* A.I.R. 1956 Punj. 201.

67. *Kamala v. Calcutta University* A.I.R. 1956 Cal. 563.

68. *Himmatlal v. State of M. P.* A.I.R. 1954 S.C. 403, *Wazirchand v. State of H. P.* (1955) S.C.R. 408.

69. *Whiswanath v. 2nd Addl. Dt. Judge*, A.I.R. 1951 Nag. 6.

70. *Veerappa v. Raman*, A.I.R. 1952 S.C. 192.

71. *Brij Kishore v. Rent Control Officer*, A.I.R. 1954 All. 428.

72. *Commissioner of Police v. Gordhandas*, 1952 S.C.R. 135.

73. *Motilal v. Govt. of U. P.*, A.I.R. 1951 All. 257.

74. *Raman Lal v. Municipal Board*, (1952) 7 D.L.R. 126.

where the application is refused without assigning reasons⁷⁵, or where no hearing is given in an appeal⁷⁶ or where a fundamental right is infringed⁷⁷, or where the statute providing the alternative remedy is itself *ultra vires*⁷⁸, *mandamus* can be resorted to.

Mandamus will be useful to enforce fundamental rights⁷⁹, to compel public official or bodies to perform their public duties *e.g.* : Syndicate of University⁸⁰, State Medical Faculty⁸¹, and Municipal Committee⁸². It is only the party whose right has been infringed that can apply for this writ of *mandamus*⁸³. If it is an incorporated company, the company can itself apply or a shareholder can do so provided his rights are also infringed⁸³.

PROHIBITION

In England this is a prerogative writ emanating from the High Court to an inferior tribunal prohibiting the latter from proceeding further with a pending matter before it. This may be based on the fact that the proceeding was without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise⁸⁴. The general policy of law is always to keep the inferior courts stick to their proper sphere of jurisdiction⁸⁵; usurpation of jurisdiction by the inferior court is thereby prohibited⁸⁶. Prohibition can lie only against judicial or quasi-judicial proceedings and never against legislative or executive functions. The writ can be claimed as of right by the aggrieved party. Only there must be a legal bar to do the act prohibited. The existence of an alternative remedy is no bar as only when there is absence or excess of jurisdiction that prohibition is resorted to. That *certiorari* is available is no bar to 'prohibition'.

When 'prohibition' can be issued.

The instances when such a writ could be resorted to can be listed thus:

- (i) when there is usurpation of jurisdiction⁸⁷;
- (ii) when the inferior court proceeds in cases where it is prohibited by statute⁸⁸;
- (iii) when the inferior court exceeds its jurisdiction⁸⁹;
- (iv) when the inferior courts have no power under the statute to act in the way they did⁹⁰;
- (v) when the inferior court commits an error in procedure which involves

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| <p>75. <i>Mungu v. Commr. of Budge Budge Municipality</i>, (1951) 87 C.L.J. 269.</p> <p>76. <i>Wanchoo v. Collector</i>, A.I.R. 1952 Punjab, 268.</p> <p>77. <i>Rashid Ahmed v. Municipal Board</i>, (1950) S.C.R. 566.</p> <p>78. <i>Bengal Immunity Co. v. State of Bihar</i>, (1955) S.C.A. 1140.</p> <p>79. <i>Rashid Ahmed's case</i> (1950) S.C.R. 566.</p> <p>80. <i>S. K. Ghose v. Vice Chancellor</i>; A.I.R. 1952 Or 1.</p> <p>81. <i>Bijoyranjan v. C. C. Das Gupta</i>, (1952) 7 D.L.R. 168 Cal.</p> <p>82. <i>Yasin v. Town Area Committee</i>, (1952) S.C.R. 572.</p> <p>83. <i>Chiranjit Lal v. Union of India</i>, A.I.R. 1951 S.C. 46.</p> <p>84. <i>Mackonochi v. Penzance</i></p> | <p>(Lond.), (1881) 6 A.C. 424.</p> <p>85. <i>Farquharsen v. Morgan</i>, (1894) 1 Q.B. 552.</p> <p>86. <i>Shirur Mutt v. Commissioner</i>, A.I.R. 1952 Mad. 613. See <i>Rex v. Chester Licensing JJ. Ex P. Bennion</i>, (1914) 3 K.B. 349.</p> <p>87. <i>Shirur Mutt v. Commissioner</i>, A.I.R. 1952 Mad. 613. See <i>Rex v. Chester Licensing JJ. Ex P. Bennion</i>, (1914) 3 K.B. 349.</p> <p>88. <i>Porter v. Rochester case</i>, (1608) 13 Co. Rep. 4: 77 E.R. 1416.</p> <p>89. <i>Peel's case</i>, 1628 Cro. Car. 113; 79 E.R. 700.</p> <p>90. <i>Re London Scottish Permanent Building Society</i>, (1893) 63 L. J. Q.B. 112.</p> |
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an act which is contrary to the general laws of the land or which is so vicious as to violate principles of natural justice⁹¹.

Writ of prohibition can be issued at any stage of the proceeding in the inferior court.

The quality of the matter whether the application is civil or criminal in nature depends on the subject-matter of the 'prohibition writ' application⁹², just as in certiorari⁹³ and of Habeas Corpus⁹⁴. The writ of prohibition is made specifically available in Arts. 32 and 226. Before the Constitution the chartered High Courts exercised this prerogative⁹⁵ by virtue of clause 4 (Calcutta) and clause 8 (Madras) and clause 5 (Bombay) of the respective charters of the respective High Courts. The *Parlakimedi case*⁹⁶ established that this jurisdiction is restricted to the original jurisdiction of the High Courts.

CERTIORARI

The origin of this writ is indicated by the original Latin formula that it required the king should be certified of the proceedings to be investigated and the object is merely to secure by the exercise of the authority of a superior court that the jurisdiction of the inferior court is properly exercised. *Certiorari* lies only in respect of judicial acts in contradistinction to ministerial acts. The writ checks inferior judicial and quasi-judicial bodies to act within the limits of their jurisdiction and not exercise excess of jurisdiction⁹⁷. Alternative remedy is no ground for refusing certiorari when particularly the tribunal acted without or in excess of jurisdiction⁹⁸ or contrary to natural justice⁹⁹. The party aggrieved has to apply and the applicant's conduct must not be such as to disentitle him to this relief such as undue delay, suppression of material facts, omission to take the objection of jurisdiction at the trial¹⁰⁰. When the impugned order is without jurisdiction or if there is an error on the face of the records or suffers for the irregularity in procedure contrary to principles of natural justice¹, in all these cases the writ of certiorari will be refused. In cases where there has been excess of jurisdiction, the writ may be moved even by a stranger as anyone of the public is entitled to do so². In the latter case the court may exercise its discretion as to whether the writ has to be issued or not. If the writ is moved by an aggrieved party the court will then grant *ex debito justitiae*. If the point is not defect of jurisdiction in respect of the impugned order the writ may be barred by the existence of an alternative remedy by way of appeal³.

It was held in *Province of Bombay v. Khusaldas*⁴ that a writ of certiorari may issue only when there is a body of persons (a) having legal authority :

91. *Martin v. Mackonochie*, (1879) 4 Q.B.D. 697.

92. *Clifford v. O'Sullivan*, (1921) 2 A.C. 570.

93. *Rag v. Fletcher*, 2 Q.B. 43.

94. *Ex parte Woodhall*, 20 Q.B. 832.

95. *Ragina v. Sheikh Fazul*, 31-D (O.S.) 461 (Calcutta). *Krishna Ayyar v. The Urban Bank Ltd., Calicut*, (1933) 56 Mad. 970.

96. 70 I.A. 129: (1943) P.C. 164: I.L.R. (1944) Mad. 457 (P.C.).

97. *Bharat Bank v. Employees of Bharat Bank*, 1950 S. C. R.

459.

98. *Sambandam v. General Manager*, (1952) 1 M.L.J. 540.

99. *Municipal Corporation v. K. C. Sen*, A.I.R. 1952 Bom. 209.

100. *M. U. M. Services v. R. T. Authority*, A.I.R. 1953 Mad. 59.

1. *Parry & Co. v. Commercial Employees Assn.*, 1952 S.C.R. 519.

2. *Asst. Collector v. Soorajmull*, (1952) 56 C.W.N. 452.

3. *Punjab National Bank v. A. N. Sen*, A.I.R. 1952 Punj. 134.

4. 1950 S.C.R. 621.

(b) to determine questions affecting rights of subjects ; (c) having the duty to act judicially; (d) acts in excess of their legal authority.

The tribunal whose order is questioned must be that of inferior judicial or quasi-judicial tribunal to the court that grants the writ. Even though the inferior court has acted within its jurisdiction yet if it has violated principles of natural justice certiorari will lie⁵ such as giving the aggrieved party the right of hearing. If there is an error apparent on the face of the record vitiating the inferior court's decision, certiorari will lie⁶. Orders of quasi-judicial bodies such as Regional Transport Authority⁷, Rent Control Authority⁸, Industrial Tribunal⁹, Customs Authority¹⁰, Board of Revenue hearing an appeal¹¹, Government disqualifying a proprietor under the Court of Wards Act¹² taking possession by the Custodian of Evacuee¹³ Property etc., are all liable to be questioned by writs of certiorari. The Court issuing the writ does not act as a court of appeal. Its province is to see merely if the lower court has exceeded its jurisdiction in which event it has merely to quash the order¹⁴. It has no power to act as an appellate body and remand the matter for fresh disposal. No such power exists under Art. 32 or 226. After the quashing order the party may come again to the lower court requesting it to discharge its duty but the court ordering the writ cannot make any directions beyond mere quashing of the illegal order¹⁵. Art. 226 does not enable the superior court to examine for itself as a court of appeal as to the correctness of the decision impugned and decide as to the proper view to be taken or the proper order to be made¹⁶. The order must be quashed as a whole and not in part if the order is not capable of being severed¹⁷. In criminal cases for want of jurisdiction the whole proceedings can be quashed by certiorari after judgment has been pronounced. But the indictment on which the judgment is pronounced cannot be quashed¹⁸. Undue delay in applying for writ¹⁹ or when the order is within jurisdiction though enormous²⁰ when the order is only an administrative and not a judicial act²¹—are all reasons for refusing a writ of certiorari. Bias of judge is a ground for issuing a writ in a case, where a clerk of a solicitor was also a clerk of the judge and he retired along with the judge when the latter exchanged their views regarding the decision. This is on the principle that justice must not only be done but seem to be done. The presence of the clerk is likely to create an impression that he influenced the judges though it may not be really the case.²² The conviction was quashed on that one ground in the certiorari proceedings. Where there is no question of excess of jurisdiction the existence

5. *Ibrahim v. R. T. A.*, A.I.R. 1951 M. 571.
6. *Badami Bai, v. Tabin*, A.I.R. 1950 Nag. 16.
7. *Motilal v. Uttar Pradesh*, A.I.R. 1951 All. 257.
8. *Jahangir v. Sait Indermull*, (1951) 6 D.L.R. Hyd. 8.
9. *Chaudry v. M. C. Bannerjee*, (1951) 55 C.W.N. 256.
10. *Surajmull v. Asst. Collector of Customs*, (1951) 87 C.L.J. 201.
11. *Nathmal v. Board of Revenue*, (1952) 7 D.L.R. 25 Raj.
12. *Avades v. U. P. State*, (1952) 7 D.L.R. 73 All.
13. *Masumali v. Custodian of Evacuee Property*, (1951) 6. D.L.R. (Sau.) 45.
14. *Veerappa v. Raman*, (1952) S.C.R. 583.
15. *Usman v. Labour Appellate Tribunal*, A.I.R. 1952 Bom. 443.
16. *Veerappa v. Raman*, (1952) S.C.R. 583.
17. *Abdul Majid v. Nayak*, (1951) 53 Bom. L. R. 921.
18. *Anwar Ali v. State of W. B.*, A.I.R. 1952 Cal. 150.
19. *Nathamuni v. Viswanathan*, 63 L. W. 867.
20. *R. v. Bolten*, (1841) 1 Q.B. 66.
21. *Emperumanar Jeer v. H. R. E. Board*, A.I.R. 1936 Mad. 973.
22. *King v. Sussex Justices: Mc Carthy Ex parte*, (1924), 1 K.B. 256.

of an alternative remedy is no bar to a writ of certiorari or prohibition.²³ Where the fundamental principle of justice such as right of being heard before an order of eviction is made a statutory obligation the non-observance of it can be questioned by a writ of certiorari even though there was an alternative remedy open by way of appeal.²⁴

Salient features for 'Certiorari'.

The prerequisites for issuance of a writ of certiorari against tribunals are :

1. The Tribunal must have legal authority²⁵.
2. It must have the duty to act judicially²⁶ certiorari is not available on mere administrative orders. It is only against quasi judicial acts of administrative bodies it can be invoked.
3. The judicial or quasi judicial authority can be served with a writ of certiorari only when it acts without or in excess of jurisdiction²⁷, or in contravention of the rules of natural justice²⁸ or commits an error on the face of the record²⁹.

When the tribunal has jurisdiction, to decide the matter certiorari cannot issue even though there is no appeal or other remedy³⁰, or where great inconvenience is caused³¹, or where the findings are erroneous *in fact*³². Mere errors of law is no ground except it is an error apparent on the face of the record³³.

The court can issue certiorari in cases where failure of justice demands it as when the determination has been made *mala fide*³⁴; or brought about by fraud, collusion or corruption³⁵; or where principles of natural justice have been contravened³⁶ (e.g., no opportunity of hearing given)³⁷; or where there is an error apparent on the face of the record³⁸. Certiorari can be issued only to an inferior tribunal³⁹ and the latter must be within the jurisdiction of the court which issues the writ⁴⁰.

Jurisdictional facts.

Want of jurisdiction in a tribunal arises in diverse ways. It may be on account of the very nature of the subject matter⁴¹. It may be due to the absence

23. *Asiatic Engineering v. Achhru Ram*, A.I.R. 1951 All. 746 (F.B.); *Nalini v. Ananda Sanakar*, A.I.R. 1952 Cal. 112; *Gangadhar v. State of Rajasthan*, A.I.R. 1953 Raj. 71; *Rour Pratap v. State of U. P.*, A.I.R. 1952 All. 99; *Lakshmi v. Commissioner*, A.I.R. 1952 M. 613.

24. *Bai Marium v. Asst. Custodian*, A.I.R. 1952 Lah. 1.

25. *Union of Workmen v. R.S.N. Co.*, A.I.R. 1951 Assam 96.

26. *Asst. Collector v. Soorajmull*, (1952) 56 C.W.N. 452.

27. *Province of Bombay v. Kushaldass*, (1950) S.C.R. 621.

28. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

29. *Ibid.*

30. *Prov. of Bombay v. Kushaldass*, (1950) S.C.R. 621.

31. *Ibid.*

32. *Hari Vishnu v. Syed Ahmed*, (1955) 1 S.C.R. 1104.

33. *Ibid. Basappa v. Nagappa* (1955) 1 S.C.R. 250.

34. *Mohasinali v. State of Bombay*, A.I.R. 1951 Bom. 303. *Asst. Collector v. Soorajmull*, (1952) 56 C.W.N. 452.

35. *Mohasinali v. State of Bombay*, A.I.R. 1951 Bom. 303.

36. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

37. *Asst. Collector v. Soorajmull*, (1952) 56 C.W.N. 452.

38. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.

39. *In re Babul Chandra A. I. R.* 1952 Pat. 309.

40. *Rashid & others v. I.T.I.C.*, (1954) S.C.R. 738.

41. *Ebrahim v. Custodian of Ev. Property*, (1952) S.C.R. 696.

of some essential preliminary or upon the existence of some facts collateral to the actual matter, which is ever so essential to try as a condition precedent to the exercise of jurisdiction⁴².

It is open to the legislature to lay the conditions under which a tribunal may exercise its jurisdiction. In such an event the tribunal cannot conclusively determine if the state of facts conditioned exist, e.g. Sec. 33-A of the Industrial Disputes Act stipulates certain conditions. If the tribunal proceeds to exercise jurisdiction in the absence of such conditions, certiorari can quash such orders⁴³. Again, who is a workman is a jurisdictional fact that can be gone into in a writ of certiorari⁴⁴. There may yet be cases where the legislature confers power on the tribunal to determine the preliminary jurisdictional facts. In such an event a wrong decision by the tribunal on the question cannot be challenged⁴⁵. A tribunal acts without jurisdiction if it purports to exercise a power not given to it under the statute or disregards the conditions stipulated by the statute for its exercise⁴⁶.

'Error apparent on the face of record'.

Such an error is good ground for a writ of certiorari, though the tribunal's order may be within its jurisdictional powers⁴⁷. It must be an error manifest on the face of the order or decision⁴⁸, or where the error is due to a wrong interpretation of a statutory provision⁴⁹, or where the decision arrived at is manifestly unwarranted by the findings⁵⁰, or where a provision of law is clearly overlooked⁵¹. A patent error which goes to the root of the matter is not merely an erroneous decision but an error on the face of the record⁵². The error must be very patent as to discountenance any disregard or ignorance of such provision of law⁵³. Where two views are possible it is not an error so patent⁵⁴. Unless it is a 'speaking order' disclosing the grounds for the decision, it is difficult to establish error on the face of the record⁵⁵. It is not such an error if it required an argument or evidence to establish it⁵⁶.

The record for these purposes is confined to the pleadings, documents which initiate proceedings and the adjudicatory order. It does not cover evi-

42. *Ibid.* See *Ravi Pratab v. State of U. P.*, A.I.R. 1952 All. 99. *Newspapers Ltd. v. Industrial Tribunal*, A.I.R. 1957 S.C. 532.
43. *Raman and Raman v. State of Madras*, A.I.R. 1956 S.C. 463. See *Automobile Products v. Rukmaji*, A.I.R. 1955 S.C. 258. *Bata Shoe Co. v. Ali Hasan*, A.I.R. 1956 Pat. 518.
44. *Refer Maharashtra Sugar Mills v. State of Bombay*, A.I.R. 1951 S.C. 313.
45. *Newspapers Ltd. v. Industrial Tribunal*, A.I.R. 1957 S.C. 532. *Ebrahim v. Custodian General*, (1952) S.C.R. 696; *Brij Raj v. Shaw and Bros.* (1951) S.C.R. 145; *Raman & Raman v. State of Madras*, A.I.R. 1956 S.C. 463; *Lilavati v. State of Bombay*, A.I.R. 1957 S.C. 521.
46. *Islam v. State of Bihar*, A.I.R. 1956 Pat. 73. See also

- Isai Ammal v. Rama*, A.I.R. 1953 Mad. 129.
47. *Badamibai v. Tobin*, A.I.R. 1950 Nag. 16.
48. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250. *Registrar v. Ishwari Prasad*, A.I.R. 1956 All. 603.
49. *Nanag Ram v. Ghinsi Lal*, A.I.R. 1952 Raj. 107.
50. *National Coal Co. v. Dave*, A.I.R. 1956 Pat. 274.
51. *Juwan Sinji v. Tribunal*, A.I.R. 1957 Bom. 182.
52. *Pattabi v. Govinda* A.I.R. 1956 Mad. 72.
53. *Mushram v. Patil*, A.I.R. 1952 Bom. 235.
54. *Batuk v. Surat Municipality*, A.I.R. 1953 Bom. 133.
55. *Hari Vishnu v. Ahmad*, (1955) S.C.R. 1104; *Basappa v. Nagappa*, (1955) 1 S.C.R. 250.
56. *Ibid.*

dence⁵⁷. The facts of each case determine the matter⁵⁸ and the court can look into other documents also⁵⁹.

Contrary to principles of natural justice.

Art. 136 affords the remedy when principles of natural justice are flouted by a judicial or a quasi judicial authority. A reasonable notice to the affected party whose civil rights have been infringed is necessary to enable him to meet the case⁶⁰. He must be given a reasonable opportunity for being heard in defence⁶¹. It must be an effective opportunity that is given⁶². But this does not mean that there is an obligation to hear a party in person⁶³ or through a lawyer⁶⁴. The question of personal hearing depends on the circumstances of each case⁶⁵. Opportunity of hearing cannot be given in such cases where, for example, there is an imminent danger of the collapse of a building and the Municipality is obliged to pull it down immediately in public interest⁶⁶, the safety of the public as well as the inmates of the house being jeopardised. In emergencies notice is not possible to be given. Where maintenance of public order demands immediate orders no notice can be given⁶⁷.

The authority should have no bias. If he has, the order passed by him offends natural justice⁶⁸. He should not be personally interested in the cause⁶⁹. The interest may be pecuniary or personal or due to influence of others. If he has personal knowledge of the case⁷⁰ or has examined himself as a witness⁷¹, the order gets vitiated. No person can be a judge in his own cause. The prosecutor shall not also be a judge. These two principles are fundamental.

Discretionary Powers.

The writ of *certiorari* is a discretionary remedy⁷². It may be denied if the party's conduct justifies such refusal⁷³. Such conduct may include undue delay in presenting the application without proper explanation for such delay⁷⁴, suppression of material facts⁷⁵, and failure to take objections as to jurisdiction at the original proceeding except where the party was then ignorant of the facts constituting the defect of jurisdiction⁷⁶. Subject to the above *certiorari*

57. *S. K. Dutt v. A. I. Jute Mills*, A.I.R. 1957 Cal. 514.

58. *Hari Vishnu v. Ahmad*, (1955) 1 S.C.R. 1104.

59. *Abanindra v. Mazumdar*, A.I.R. 1956 Cal. 273. See *Nanagram v. Ghinsilal*, A.I.R. 1952 Raj. 107; *Badamibai v. Tobin*, A.I.R. 1953 Nag. 18.

60. *Muktar Singh v. State of U. P.*, A.I.R. 1957 All. 297.

61. *Pipa Pal v. University of Calcutta*, A.I.R. 1952 Cal. 594; *Gobardhan v. State of Bihar*, A.I.R. 1957 Pat. 341.

62. *Dakeshwari Mills v. Commr. of I. T.*, A.I.R. 1955 S.C. 65. *Abul Azeez v. State of Mysore*, A.I.R. 1957 Mys. 12.

63. *In re Shanmugam* (1950) 2 M.L.J. 399.

64. *Mulchand v. Mukhund*, A.I.R. 1952 Bom. 296.

65. *Mahabir Motor Co. v. State of Bihar*, A.I.R. 1956 Pat. 437.

Balagurunathan v. C. R. T. Board, A.I.R. 1957 T. C. 141.

66. *Ajoy Kumar v. Calcutta Corporation*, A.I.R. 1956 Cal. 411.

67. *Bapu Rao v. State*, A.I.R. 1956 Bom. 300.

68. *Manak Lal v. Prem Chand*, A.I.R. 1957 S.C. 425.

69. *Ibid.*

70. *Hurpurshad v. Sheo Dyal*, 3 I.A. 259.

71. *Moti Lal v. State* A.I.R. 1951 All. 257 (F.B.).

72-73. *Rashid v. I. T. I. Commn.*, (1954) S.C.R. 738. *Allison v. Sen*, A.I.R. 1957 S.C. 227.

74. *Azizunnissa v. Asst. Custodian*, A.I.R. 1957 All. 563.

75. *M. U. M. Services v. R. T. Authority*, A.I.R. 1953 Mad. 59.

76. *Ambaram v. Gurman Singh*, A.I.R. 1957 M.P. 58. *G. M. T. Society v. State of Bombay*, A.I.R. 1954 Bom. 202.

can be claimed as of right (*ex debito justitiae*), in cases of want of excess of jurisdiction⁷⁷. Jurisdictional facts should be raised in the original proceeding. If a party submits to it, he cannot later raise it in certiorari proceedings. But if it is patent on the record that there is clear want of jurisdiction, acquiescence or consent in the earlier proceedings cannot confer jurisdiction to the tribunal which had none⁷⁸.

Alternative remedy.

Certiorari being a discretionary remedy may be refused if there is a suitable alternative remedy⁷⁹, or a statutory right of appeal⁸⁰. But an alternative remedy is no bar when it is patent on the face of the proceeding⁸¹ that the inferior tribunal has acted in excess of jurisdiction or without jurisdiction⁸² and has acted against fundamental principles of justice⁸³. When the alternative remedy is not adequate, speedy or effective *certiorari* does lie⁸⁴.

The remedies under Articles 32 and 226 are constitutional and as such they cannot be barred by provisions of any statute⁸⁵. The finality clauses in any statute cannot affect the above remedies when the impugned order is without jurisdiction or if there is an error apparent on the face of the record, or if there is any irregularity in the procedure adopted opposed to principles of natural justice⁸⁶.

Who can apply.

Except in *Habeas Corpus*, none whose rights are not affected can apply under Art. 32⁸⁷. But in respect of *certiorari*, a decision of the Calcutta High Court⁸⁸ stipulates that a person who is not a party to the prior proceeding cannot apply. But later decisions⁸⁹ seem to affirm the principle that if it is viewed that the right affects the public generally, then any individual citizen can invoke the remedy against an order which is manifestly illegal or *ultra vires*⁹⁰. In election matters any voter can seek the remedy though the candidate to the election is silent⁹⁰. But where the applicant is the aggrieved party, there will be grant of the writ *ex debito justitiae* (as of right). But if it is a party who is not personally interested, discretion vests in the court to grant it or not⁹¹.

QUO WARRANTO

The writ of quo warranto is for the purpose of determining the right of a person in office to hold the office and directing him to disclose under what autho-

77. *Abdul Mazid v. State of Madras*, A.I.R. 1957 Mad. 551.

78. *National Coal Co. v. Dave*, A.I.R. 1956 Pat. 294.

79. *Rashid v. I. T. I. Commn.* 1954 S.C.R. 738.

80. *Punjab National Bank v. Sen*, A.I.R. 1952 Punj. 134.

81. *Ispahani v. Union of India*, A.I.R. 1957 Cal. 430. *Prashai v. Dwarakadass*, A.I.R. 1956 Bom. 530.

82. *Sambandam v. General Manager*, (1952) 1. M.L.J. 540.

83. *Municipal Corporation v. K. C. Sen*, A.I.R. 1952 Bom. 209.

84. *Subramanya v. Revenue Divisional Officer*, A. I. R. 1956 Mad. 454.

85. *Lilavati v. State of Bombay*, A.I.R. 1957 S.C. 521.

86. *Parry & Co. v. Commercial Employees' Assn.* (1952) S.C.R. 519.

87. *Chiranjit Lal v. Union of India*, A.I.R. 1951 S.C. 41.

88. *Sisir Kumar v. Majumdar*, A.I.R. 1955 Cal. 309.

89. *Asst. Collector v. Soorajmull*, (1952) 56 C.W.N. 452; *Damodar v. Narayanan*, A.I.R. 1955 Assam 164.

90. *Damodar v. Narayanan* A.I.R. 1955 Assam 164; *Sasamusa Sugar Works v. State*, A.I.R. 1955 Pat. 49.

91. *Asst. Collector v. Soorajmal*, (1952) 56 C.W.N. 452.

urity he is holding that office. This is a discretionary order and cannot be available to the applicant of the writ as of right⁹². Such a writ can issue only when :

(i) The office in question must have been created by statute or by charter from the Crown⁹³ or as in India by the Constitution of India⁹⁴.

(ii) It must be a public or quasi-public office (not judicial)⁹⁵.

(iii) The office must be a permanent one, i.e., its incumbent must not be removable at the pleasure of another⁹⁶.

(iv) The impugned person must be then in occupation of the office⁹⁷.

(v) The applicant of the writ must have an interest in the office in question⁹⁸.

(vi) The Court does use its discretion in favour of the applicant.

That this kind of writ was not in common use in Indian law, is made apparent by the paucity of case law in the matter.

Arts. 32 and 226 have included this writ. We have now cases of such writs issued against Chief Engineer of a corporation⁹⁹ or against the Speaker of a Legislative Assembly¹⁰⁰. Quo warranto may be refused when it is vexatious or when it would be futile in its results or where there is an efficacious alternative remedy, when the irregularity is not material or when there is laches¹, when the applicant's conduct is one of acquiescence², when the quo warranto order may result in chaos³ and disturb peace and quiet of a corporation unless the alleged illegality in the election of the candidate to the municipality is too grave and manifest⁴.

Any person can move for the writ whether any fundamental right or other legal right of such person is infringed or not⁵. But the Madras High Court has however held⁶, that under Art. 226 no person whose rights are not directly affected can apply and that a writ of quo warranto is no exception. But the latter view appears to be overstating the principle enunciated by the Supreme Court in Chiranjit Lal's case⁷. Only the officer concerned is a necessary party. In Allahabad there are rules 1 and 7 of Ch. 22 of the Allahabad High Court, 1952, which enjoin that an application for quo warranto should be made to a Division Bench by an Advocate and not by the party personally⁸. The special leave to appeal under Art. 136 is discretionary and so cannot be termed such an alternative relief as to bar recourse to Art. 226⁹.

92. *R. v. Ward*, (1873) L.R. 8 Q.B. 210.

93. *Darbey v. R.*, (1846) 12 Cl. & Fin. 520 H.L.

94. *Ananda v. Ramsahay*, A.I.R. 1953 M.P. 31.

95. *Express Smith*, 8 L. T. 458.

96. *R. v. Jones*, (1878) 42 J. P. 614.

97. *R. v. Whitewell*, (1792) 5 Tern. Rep. 85.

98. *R. v. Briggs*, (1864) 11 L.T. 372.

99. *Ashgar Ally v. Birendra*, (1945) 49 C.W.N. 658.

100. *Nesamony v. Virghese*, A.I.R. 1952 T.C. 66.

1. *Surendra v. Gopal*, A.I.R.

1952 Orissa 359.

2. *Gama v. Banwarilal*, A.I.R. 1953 Nag. 81 (86).

3. *Mohichandra v. Secy., Local Self Govt.*, A.I.R. 1953 Assam 12.

4. *Surendra v. Gopal*, A.I.R. 1952 Orissa 359.

5. *Haran v. State of W. Bengal*, A.I.R. 1952 Cal. 907.

6. *In re Chakkarai*, A.I.R. 1953 Mad. 96.

7. A.I.R. 1951 S. C. 41.

8. *Masehulla v. Abdul*, A.I.R. 1953 All. 193.

9. *Ranganadhan v. M. E. T.*, A.I.R. 1952 Mad. 659.

General Features of Art. 226.

Art. 226 clothes the High Court with powers—

(i) to issue writs, directions or orders in the nature of Habeas Corpus, mandamus, prohibition, quo warranto and certiorari;

(ii) to any person, authority or any Government, if necessary ;

(iii) for the enforcement of any of the fundamental rights set out in Part III;

(iv) and for any other purpose;

(v) when any such fundamental right or legal right has been in fact infringed;

(vi) this power of the High Court can be exercised throughout its territorial jurisdiction;

(vii) this power shall not be in derogation of the power conferred on the Supreme Court by Art. 32 (2).

This right under Art. 226 is personal right¹⁰; thus wherever a nomination is made by Governor under Art. 171 (3) (e) and (5) it cannot be challenged by an elected member of the Legislative Assembly under Art. 226 as it is not a personal right of the applicant¹⁰. Though the remedy under Art. 226 is only for personal rights of the petitioner the exception is in the case of Habeas Corpus where he can move for another's right¹¹, provided he is not an absolute stranger¹¹. No order in the nature of temporary injunction can be granted under Art. 226 for facilitating the institution of a suit¹². No interim relief can be given in any proceedings thereby disposing of in a way the entire proceeding without finally adjudicating the rights of parties¹². In an application under Art. 226, though the proper relief is not prayed for, suitable orders can be passed by the court for protection of the applicant's fundamental right¹³. The question is if the right to move the High Court for the enforcement of a fundamental right under Art. 226 is by itself a fundamental right in the same manner as a motion is under Art. 32. No doubt Art. 32 (1) specifically makes it mandatory and guarantees the right to such a constitutional remedy and further Art. 32 figures in Part III of the Constitution which is titled 'Fundamental Rights'. Art. 226 comes under Part VI, Chapter V, under the heading 'The High Courts in the States', and there is no provision in Art. 226 corresponding to Art. 32 (1). Hence the right to move under Art. 226 cannot be termed a fundamental right in the strict sense of the term¹⁴. If an applicant wants to avail himself of such a right he should resort to the Supreme Court under Art. 32. The motion under Art. 226 to the High Court does not yield so mandatory a result as under Art. 32. In the latter the protection is guaranteed. In the former, the High Court no doubt has the power to give the relief, but it is not tied down to peremptorily give such relief. It may or may not use its powers in that direction. The contrary view as expounded in some cases¹⁵

10. In re *Ramamoorthy*, (1952) 2 M.L.J. 671; A.I.R. 1953 Mad. 94.

11. *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

12. *Ibid.*

13. *Ibid.* Also see *Yasin v. Town Area Committee*, (1952) S.C.R. 572.

14. *B. B. Light Ry. v. Dt. Board*, A.I.R. 1952 Pat. 23 (26).

15. See opinion in *Buddhu v. Allahabad Municipality*, A.I.R. 1952 All. 773; *United Motors v. State of Bombay*, 1952 Bom. L.R. 246; *Manjulon v. Pradhan*, (1952) 7 D.L.R. 101 Cuttack.

and by Mr. D. D. Basu¹⁶, does not appear to be sound. But the High Court is nevertheless bound to exercise its power whenever it sees a clear infringement of a fundamental right as these rights are guaranteed under Part III of the Constitution. All that we want to state is while the right of motion under Art. 32 is a guaranteed fundamental right by itself no such inviolable sanctity can be attached to the right of motions under Art. 226. This appears to be clear since Art. 32 confines its operation to fundamental rights while Art. 226 extends to other legal rights also. On account of this latter aspect, Art. 226 appears to vest a discretionary exercise of the power in the High Court. Thus, where adequate relief is possible in a civil¹⁷ or a criminal proceeding, relief under Art. 226 may be refused even where the fundamental right has been infringed¹⁸.

The powers of the High Court are wider under Art. 226. Under Art. 226 writs in the nature of prerogative writs also can be moved¹⁹. So in India in so far as High Courts are concerned the field is larger of application than in England in matters of writs in the nature of Habeas Corpus, mandamus, certiorari, quo warranto and prohibition²⁰. If there is no existing grievance no relief can be granted to the petitioner²¹. Though the power under Art. 226 is wide it cannot be abused for mere examination of the constitutionality of an Act²². Art. 226 is not to be fettered by any provision of law existing or future²³. It is sacrosanct and cannot be whittled down by any legislation except by way of constitutional amendment under Art. 368. Any such restrictive legislation will be void²⁴.

The exercise of the power of the High Court in respect of enforcement of other legal rights than fundamental rights is quite discretionary²⁵. Thus the court may exercise its discretion against the applicant on the ground that the right cannot be effectively established in a summary proceeding under Art. 226 or that there are disputed questions of fact which could not be properly adjudicated in such a proceeding²⁶. Undue delay in resorting to the remedy after the alleged infringement, if not satisfactorily explained may entail refusal of relief under Art. 226²⁷. But delay by itself is no absolute bar as where it is quite clear on the face of the order that the authority never applied its mind to the making of the order²⁸ or where the applicant is not an individual but a club or social organization which may not quickly react to the imposition of an illegal tax²⁹. Any deliberate concealment or misstatement of material facts may bar relief under Art. 226³⁰. If there is a

16. *Vide* Basu's 'Annotated Constitution of India,' p. 244.

17. *Venkatanarasayya v. State of Madras*, A.I.R. 1953 M. 60.

18. *Ranvijai v. Forest Officer*, A.I.R. 1953 H.P. 33; *Santipriya v. Surendra*, A.I.R. 1952 Cal. 137.

19. *Paraju v. General Manager, B. N R.*, A.I.R. 1952 Cal. 610.

20. *Anwar Ali v. State of W. B.*, A.I.R. 1952 Cal. 150.

21. *Animati v. A.R. C. R.*, (1952) 57 C.W.N. 194.

22. *Sheoshankar v. M. P. State*, A.I.R. 1951 Nag. 58.

23. *Elbridge v. R. K. Das*, A.I.R. 1951 Cal. 430.

24. *Ramaniranjan v. Addl. Dist. Magistrate*, (1952) 7 D.L.R.

151 (All.); *Lakshmi Lal v. Bhagwat*, (1952) 7 D.L.R. 7 Raj.

25. *Gopal v. State of M.P.*, A.I.R. 1951 Nag. 181; *B. B. Light Ry. Co. v. State of Bihar*, A.I.R. 1951 Pat. 251.

26. *Wazir v. State of H. P.*, A.I.R. 1952 H.P. and B. 35.

27. *Nathamuni v. Biswanath*, A.I.R. 1951 Mad. 250.

28. *Jaggiwandas v. State of Bombay*, (1952) 7 D.L.R. 149 (Bom.).

29. *Cosmopolitan Club v. D. C. Tax Officer*, (1952) 7 D.L.R. 144 Mad.

30. *Ratan v. Adhari*, (1951) 56 C.W.N. 303.

pending litigation in respect of the same right 'ordinarily' no relief may be granted under Art. 226³¹. An alternatively available remedy which is equally efficacious or adequate may ordinarily bar relief under Art. 226, but if the alternative remedy is really such is a fact to be decided in each case. In *Rakhaldas v. S. P. Ghose*³² it was stated that a writ under Art. 226 could be issued notwithstanding an alternative remedy where the inferior tribunal's assumption of jurisdiction is apparent on the face of the record or where the proceedings are against natural justice or where the other remedy is too costly, ineffective or entails delay. In short it may be stated Art. 226 is so wide that an alternative remedy is no absolute bar and the High Court's jurisdiction cannot be circumscribed or whittled down in this regard³³. In appropriate case relief can be granted³⁴ and the rule of alternative remedy is more for the guidance and consideration of the court than an absolute bar³⁵. Thus in one case³⁶ since it was a social club which cannot afford to litigate under a special Act (alternative remedy) the High Court granted relief under Art. 226; this article cannot be resorted to enforcement of a contract or for a declaration that it is void³⁷ or for a mere infringement of copyright³⁸.

Forum and Practice.

The forum for applications of writs under Art. 226 is before a single judge in Madras³⁹ and Calcutta⁴⁰ while it is a Division Bench in Allahabad⁴¹. But in the latter it is a single judge for Art. 227⁴². Rules of the respective High Courts govern the matter.

An application under Art. 226 is not a regular suit. Only persons against whom relief is claimed are necessary parties³⁹. In the absence of special rules framed by the High Court governing the procedure under Art. 226, the ordinary rules have to be observed. A petition should be supported by an affidavit and copies furnished to the opposite side to enable the latter to file its objections, a copy of which should also be furnished to the applicant to enable him to file a reply if any⁴⁰. The High Court is not functioning as a court of appeal when it exercises its powers under Art. 226. The constitutionality of an order as it appears on the face of it can alone be considered by it and not the entire evidence, admissibility of the same or not, etc.⁴¹

An appeal lies to a Division Bench from the order of a single judge under Art. 226 as per Madras and Calcutta High Courts⁴². An order dismissing an application for certiorari is liable to review as under O. 47, R. 1, C.P. Code⁴³. There appears to be no bar to a second application under Art. 226, particularly when the prior one was disposed of on a preliminary point⁴⁴.

31. *Kailash v. A. A. C.*, A.I.R. 1952 Ajmer 31.

32. A.I.R. 1952 Cal. 171.

33. *Cosmopolitan Club v. Com. Tax Office*, (1952) 1 M.L.J. 401; *Rakhaldas v. S. P. Ghose*, A.I.R. 1952 Cal. 171; *Cama Bamwarilal*, A.I.R. 1953 Nag. 82.

34. *Sambandam v. General Manager*, A.I.R. 1953 Mad. 54.

35. *Munnalal v. Harold Scott*, (1950) 57 C.W.N. 157.

36. *Cosmopolitan Club v. D.C. Tax Officer*, (1953) 7 D.L.R. 144 Mad.

37. *Devi Dayal v. Pepsu State*,

A.I.R. 1953 Pepsu 9.

38. *K. Publishing House v. Govt. of T. C.*, A.I.R. 1952 T.C. 38.

39. *Ramayya v. State of Madras*, A.I.R. 1952 Mad. 300.

40. *Budge Budge Municipality v. Mangu*, (1952) 57 C.W.N. 25.

41. *Masehulla v. Abdul*, A.I.R. 1953 All. 193.

42. *Ramprasad v. State*, A.I.R. 1952 All. 843.

43. *Chenchanna v. Praja Sev.*, (1952) 1 M.L.J. 448.

44. *Mohischandra v. Secy., Local Self Govt.*, A.I.R. 1953 Assam 12.

But the same grounds as in the prior application cannot be traversed in the second application.

The words 'including writs' and 'direction and orders' in Arts. 32 (2) and 226 (1) indicate that apart from writs of the English common law variety the Supreme Court and the High Court can issue writs in the nature of Habeas Corpus, prohibition etc.⁴⁵ and also 'direction' or orders in the nature of the above writs. All this is apart from what is postulated in Sec. 491, Cr. P. Code and Sec. 45, Specific Relief Act.

A 'direction' may be for instance a direction to State Government prohibiting it to enforce a restraint order against the petitioner though internment may not be strictly 'detention' for purposes of a writ of Habeas Corpus and though the order of prohibition is not the same as Habeas Corpus⁴⁶.

"Throughout the territories to which it exercises jurisdiction".

These words mean the entire jurisdiction of the High Court original or appellate⁴⁷. What is the jurisdiction if the person against whom the writ is to issue is resident within the jurisdiction but the impugned act is outside the jurisdiction? One view is the writ operates *personam* and though the act is outside if the person is inside the jurisdiction it is enough⁴⁸. In *Madras Electric Tramway v. Ranganadham*⁴⁹, the contrary was held. It stated that not only the authority whose action is impugned should be located within the jurisdiction but the impugned function must have also taken place within that jurisdiction. In *Election Commission v. Saka Venkata*⁵⁰, the Supreme Court has held that the words 'within those territories' imply that the person or authority against whom a writ is issued must be either resident or located within the jurisdiction.

"For any other purpose".

The words 'for any other purpose' mean purpose for which any of the writs could issue by long established principles. The applicant under Art. 226 should first prove the existence of a legal right before he claims the further reliefs. Art. 226 does empower interference with reference to purely political rights⁵¹. The Supreme Court observed in a recent case, *Tribunal v. Venkata*⁵², "The framers of the Constitution having decided to provide for certain safeguards for the people in the set up, which they call fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and finding that the prerogative writs which the courts in England had developed and used whenever urgent necessity demanded immediate and decisive inter-position were peculiarly suited for the purpose, they conferred in the State's sphere new and wide powers on the High Courts of issuing directions, orders or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc., 'for any other purpose' being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the courts of King's Bench in England".

45. *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566.

46. *Brajnandan v. State of Bihar*, A.I.R. 1950 Pat. 322.

47. *Srinivas v. State of Madras*, A.I.R. 1951 M. 70.

48. *Narsh v. Union of India*, A.I.R. 1952 Cal. 757; *Jupiter Co. v. Rajagopalan*, A.I.R. 1951

Punjab 9 (12).

49. (1952) Bom. L. R. 552. See *Ranganadham v. Madras Electric Tramways*, A.I.R. 1952 Mad. 659.

50. (1953) S.C.A. 203.

51. In re *Ramamurthy*, A.I.R. 1953 Mad. 94.

52. A.I.R. 1953 S.C.A. 203.

Judicial Interpretation under Art. 226 when writ lies.

The powers of the High Court under Art. 226 are wide enough even to interfere with mere administrative orders⁵³ but this power is limited to appropriate cases, i.e. cases which require the exercise of quasi-judicial powers by the Government⁵⁴. Such a case would arise where an appellate authority under the Motor Vehicles Act cancels a permit for plying a motor vehicle in a certain route without notice to the party, which is against the basic principles of natural justice and procedure⁵⁵. When the right to be affected is a natural or common law right of a person there is a presumption that the authority vested with the power to affect such right must act quasi-judicially⁵⁶. As Art. 226 contemplates any 'directions, orders or writs' the High Court has the power to interfere, even in the case of administrative orders, if made in defiance of mandatory provisions of law or without jurisdiction⁵⁷. In an administrative act which is executive while the authority may be bound to make an enquiry he is not bound to give a decision as a result of the enquiry but may act in his discretion in utter disregard of the merits of the enquiry. But in a judicial or quasi-judicial enquiry (administrative enquiry may be quasi-judicial) the authority is bound by law to act on the facts and circumstances as determined upon the enquiry in which a person to be affected is given full opportunity to place his case before the authority even though the decision of such authority, whether right or wrong, may be final and may not be liable to be challenged in a court of law⁵⁷. A declaration under Sec. 8 (1) (b) of the U. P. Court of Wards Act IV of 1912 was considered a quasi-judicial act and as such a writ of certiorari was issued in respect of an order which placed the female proprietors in an unreasonable classification on the ground of sex violating Arts. 15 and 19 (i), (f) of the Constitution. A purely administrative order of Government cannot be interfered with by issue of writ of certiorari⁵⁸. The words 'in appropriate cases' mean cases which require the exercise of quasi-judicial powers by the Government⁵⁹; unless there is an infraction of a personal right there can be no valid application for a writ of quo warranto under Art. 226⁶⁰. An application for writ so as to short circuit the procedure provided by the impugned Act is not allowable. Thus under Sec. 21, E.P. Sales Tax Act (XLVI of 1948) it is open to the assessee to go in revision to the Financial Commissioner and if he is not satisfied with the decision of the Financial Commissioner he can have the case stated to the High Court under Sec. 22 of the same Act. With these alternative remedies available no writ under Art. 226 can lie⁶¹. In *Govinda Reddy v. Pattabi Rama Reddy*⁶², it was held that where the grant was before the High Court and the only point for determination was whether on its true construction, it was an estate as defined in Sec. 3 (2) (d) of the Madras Estates Land Act 1 of 1908 and the decision of the Estates Abolition

53. *Bhikulal v. State of M. P.*, 1952 N.L.J. 682.

54. *Bhidhu Bhushan Bagchi v. State of West Bengal*, A.I.R. 1952 Cal. 901.

55. *Ghisalal v. Regional Transport Authority*, A.I.R. 1952 M.B. 128.

56. *Avadesh Pratap Singh v. U.P. State*, A.I.R. 1952 All. 63.

57. *Ramcharan Lal v. State of V. P.*, A.I.R. 1952 All. 752.

58. *Mrs. A. Cracknell v. State of U. P.*, A.I.R. 1952 A. 746; 1952

A.L.J. 293.

59. *Bidhu Bhushan Bagchi v. State of West Bengal*, A.I.R. 1952 Cal. 901.

60. In re *Chakkari Chettiar*, (1952) 2 M.L.J. 779; (1951) S.C. 399 and 1950 S.C.R. 869 relied on.

61. *Dharamchand Kishore Chand Puri and Bros. v. Excise and Taxation Commissioner, Julundur*, A.I.R. 1953 Punj. 27.

62. (1953) 2 M.L.J. 478; 66 M.L.W. 916.

Tribunal was on the face of it erroneous, in such a case it would be a proper exercise of the powers of a High Court to interfere even if there was another remedy open to the petitioner.

Any other purpose.

These words in Art. 226 presupposes the infringement of some right of the petitioners though not under Part III of the Constitution, as a condition precedent to the issue of the writs or order; the simple reason is that no question of relief arises where there was no infringement of any right⁶³, i.e., legal right.⁶⁴ The determination of that right should not depend upon an elaborate procedure possible only in a suit and not in a proceeding summarily done under Art. 226. The use of the words 'shall have power' in the said Article emphasises the fact that the issue of writ, etc., in question is certainly a matter in the discretion of the Court⁶⁵.

Though the power of the High Court under this Article is ordinarily exercisable for enforcement of right or enforcement of duty it cannot necessarily be limited only to such cases. For in writs in the nature of quo warranto the applicant does not seek to enforce any right of his as such nor does he complain of any non-performance of duty towards him. The only question there is the right of somebody else to hold the office and the relief is for ousting him from office⁶⁶. The words 'any other purpose' in Art. 226 mean no more than any other purpose ancillary to the enforcement of any of the rights conferred by Part III of the Constitution⁶⁷.

Where writs will not lie.

It is not the object of the Constitution to enable a citizen to break or ignore the obligations under lawful contracts entered into by him (Abkari contract with the State in the instant case) on the pretext of such obligations being repugnant to his fundamental right to carry on his business⁶⁸. It is the contract that is broken and his right to carry business rests on the contract and the violation of the terms of the contract by the applicant is his own doing and it is an abuse of Art. 226 to invoke any writ to enforce a broken contract. Departmental regulations which do not create any statutory or legally binding rights and duties, cannot have the force of law so as to invoke Art. 226 for alleged breach of the regulations⁶⁹. Where the State Medical Faculty through the Governing Body gave no notice at all of the charges against the candidates which was 'using unfair means' and no opportunity whatever of showing cause against the charges was afforded and there was no individual consideration of the candidates, the punishment imposed, namely cancellation of the examination of the applicants, was too drastic and richly called for a mandamus to ensure that the Faculty performed its duties properly⁷⁰. There must be a demand for justice and a refusal before a writ under Art. 226 is resorted

63. *Wazir Chand v. State of Himachal Pradesh*, A.I.R. 1952 H.P. & B. 35.

64. *Shah Transport Co. v. State of M. P.*, A.I.R. 1952 Nag. 353.

65. *Wazir Chand v. State of Himachal Pradesh*, A.I.R. 1952 H.P. & B. 65.

66. *Karkare v. Shevde*, I.L.R. (1952) Nag. 409; A.I.R. 1952

Nag. 330.

67. *Govind Prasad v. State of Bhopal*, A.I.R. 1952 Bhopal 1.

68. *Krishnan Kutty v. State*, A.I.R. 1952 T.C. 287.

69. *Banchanidhi Somantray v. Secretary, Bhakta Madhu Vidyapeetha*, A.I.R. 1952 Orissa 359.

70. *Das Gupta v. Bijoyranjan Rakshit*, 56 C.W.N. 861.

to⁷¹; suppression of material facts in the affidavit will forfeit the right to a writ⁷².

Where a citizen is deprived and dispossessed of his property against his will without any authority of law by the police, taking the law into their hands by departmental orders and without recourse to the ordinary civil courts, there is a violation of the fundamental rights guaranteed by Art. 31 (1) of the Constitution and the High Court will under Art. 226 issue a writ and the necessary direction for the restoration of his property to the person who has been deprived of the same.

A writ of certiorari ordinarily lies to correct the decisions of subordinate courts and tribunals when those decisions are given in excess of jurisdiction or in irregular exercise of jurisdiction or when in the exercise of jurisdiction rules of natural justice are violated⁷³. The Court has also jurisdiction to issue the writ to correct an error of law provided that error is apparent on the face of the record—an error which is so manifest or patent that the superior Court will not permit the subordinate Court to come to a decision in the face of a clear ignorance or disregard of a provision of law and not an error which can be pointed out to the superior Court after an elaborate and long argument. It has been held by the Supreme Court in *Parry & Co., Ltd., Madras v. Commercial Employees' Association*⁷⁴ that in spite of the provisions of Sec. 51 of the Madras Shops and Establishments Act that the decision of the Labour Commissioner would be final, the superior court is not absolutely deprived of the power to issue a writ, although it can do so only on ground of either a manifest defect of jurisdiction in the tribunal that made the order or of a manifest fraud in the party procuring it. A declaration by the Government under the U. P. Court of Wards Act that a person was 'incapable of managing the estate' made without following the procedure prescribed under the Act, namely giving an opportunity to the person affected to show cause against the grounds stated—is liable to be quashed on an application under Art. 226⁷⁵. In *Ponnusamy v. Returning Officer, Nanakkal*⁷⁶, the Supreme Court held that the High Court had no jurisdiction under Art. 226 to entertain petitions regarding improper rejection by the returning officer of nomination papers of candidates for election either to Houses of Parliament or to State Assembly. Art. 329 which covers 'electoral matters' has excluded such a jurisdiction in the High Courts. The High Court will refuse to act under Art. 226 if another remedy is available. Thus in one case Sec. 13 of the U. P. Court of Wards Act was considered not to provide an adequate remedy for a person aggrieved by an order under Sec. 8 so as to disentitle him to apply under Art. 226⁷⁷. But cases of breach of contract can be actionable by other remedies and Art. 226 will not apply in such cases⁷⁸. Order by Custodian of Evacuee Property without any provision

71. *Shambhu Dayal v. Pepsu*, A.I.R. 1952 Pepsu 152; *Indian Quarter Masters' Union v. P. R. Dutt*, A.I.R. 1951 Cal. 570.

72. *Ganesh Das Ram Gopal v. Govt. of U. P.*, A.I.R. 1952 A. 992; *Thulasi Das Manoji v. Allepy Chamber of Commerce*, A.I.R. 1953 T.C. 26; *Ratan Chandra v. Addhar Biswas*, A.I.R. 1952 Cal. 72; *Kista Reddy v. Commissioner of City Police*, A.I.R. 1952 Hyd. 36.

73. *Mushra v. Patti*, A.I.R. 1952 Bom. 235.

74. 1952 S.C.J. 275 (S.C.): (1952) 1 M.L.J., 813; A.I.R. 1952 S. C. 179; (1952) S.C.R. 519. See also *Chenchanna Naidu v. Prajaseva Transport, Ltd.*, I.L.R. (1952) Mad. 1009; (1952) 1 M.L.J. 448.

75. *Avadesh Pratap Singh v. State of U. P.*, A.I.R. 1952 All. 63.

76. 1952 S.C.J. 100; A.I.R. 1952 S.C. 64; (1953) 1 M.L.J. 775.

77. *Ravi Pratap v. State of U. P.*, A.I.R. 1952 All. 99.

78. *Budhmal v. Gulabsing*, A.I.R. 1952 Raj. 151.

of notice under Sec. 7 (1) of Administration of Evacuee Property Act is contrary to fundamental principle of justice and so though the Act provides under Sec. 26 a remedy from the Custodian's order a writ of certiorari will lie to quash the order⁷⁹. Where total absence of jurisdiction appears on the face of the proceedings in an inferior court the High Court is bound to issue a prohibition order although the applicant of the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior court⁸⁰. An application for the issue of a quo warranto for testing the validity of the appointment of an Advocate-General under Art. 165 by the Governor is maintainable although the Governor is not amenable to the process of Court by virtue of Art. 361 and although the office of the Advocate-General is one held during the pleasure of the Governor. A quo warranto lies where there is an usurpation of office of a public nature and substantive in character⁸¹. In *re Anandan Nambiar*⁸² it has been held that if a member of the Legislative Assembly is arrested and lawfully detained, though without actual trial under the Preventive Detention Act and the detention is lawful, *bona fide* and for proper grounds, he cannot be permitted to attend the sittings of the House. But if a party in power detains a political opponent or continues his detention with the *mala fide* object of stifling opposition and prejudicing the party to which he belongs in a forthcoming election there would be an undermining of the Constitution. During the detention the M.L.A. is nevertheless entitled to the privilege of corresponding with the Speaker as allowed under Art. 194 (3)⁸³.

Mala fides of Government leading to the quashing of the order of detention will result if the subsequent order of detention is not brought to the notice of the court at the time of delivery of judgment in a writ of Habeas Corpus questioning detention under an earlier order⁸⁴. There can be no writ of prohibition against the All-India Congress in respect of an election of a sub-committee as it is not a public statutory body but private association for which the ordinary civil law is enough⁸⁵. The principal of a private College though a quasi public officer, a writ of mandamus will not lie against him for dismissing a student for bad and impertinent behaviour as that was proper exercise of his discretion and could not be called arbitrary⁸⁶. In *Prahlad Krishna Kurane*, in re⁸⁷ it was held that the decision of the High Court is final *qua* the High Court notwithstanding that the interest of individual liberty and the cause of fundamental rights guaranteed to the citizen are involved. The applicant has however an independent right to approach the Supreme Court, notwithstanding the refusal of High Court in its primary jurisdiction, and he has also a right of appeal to the Supreme Court. A second application after the rejection of an earlier application is therefore incompetent⁸⁷. The High Court will not ordinarily interfere under Art. 226 in respect of detaining of students in class examinations in Universities unless the act complained of is beyond the jurisdiction of the Varsity or is against rules of natural justice⁸⁸. Where the State Medical Faculty gave no opportunity to the pupils accused of 'unfair

79. *Allaudin Alla Bux v. M. R. Meher*, A.I.R. 1952 Bom. 213; I.L.R. (1952) Bom. 851.

80. *P. R. Ranade v. State of Vin-dya Pradesh*, A.I.R. 1952 U.P. 35.

81. *Karkare v. Shevde*, A.I.R. (1952) Nag. 330.

82. (1952) 1 M.L.J. 1 : A.I.R. 1952 Mad. 117.

83. *Ibid.*

84. *A. K. Gopalan*, In re, (1952) 2

M.L.J. 690.

85. *Nagabhushana Reddy*, In re, (1950) 2 M.L.J. 278.

86. *Sekkilar v. Krishnamoorthy*, (1951) 2 M.L.J. 568.

87. 6 D.L.R. Bom. 28; 1951 Bom. 181 : A.I.R. 1951 Bom. 25.

88. *Shudarshan Lal Divedi v. Dean of Faculty of Science, University of Allahabad*, A.I.R. 1953 All. 95.

means to explain, it lacked in *bona fides* and court can issue mandamus under Art. 226⁸⁹. Deliberate misstatement of fact will entail refusal of writ⁹⁰. In order that a writ of certiorari may issue for quashing the departmental proceedings and the order of dismissal which follows as a result of such proceedings. It must be shown that an obligation or duty has been imposed by statute upon the employer to act judicially or quasi-judicially in relation to such inquiry⁹¹. It is settled practice that no ground shall be relied upon or relief set out at the hearing of the motion except the grounds and relief set out in the application and a writ would be refused where the case tendered by the petition is radically different from that set up upon argument⁹². The Supreme Court has held in *Saka Venkat Rao v. The Union of India*⁹³, that a twofold limitation arises under Art. 226. The first limitation is, the power has to be exercised 'throughout the territories in relation to which it exercises jurisdiction'. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be within those territories by residence or location. Hence in the instant case it was held that the High Court of Madras had no jurisdiction to issue a writ of prohibition restraining the Election Commission having its offices permanently located at New Delhi from enquiring into the alleged disqualification of a candidate for membership of the Madras Legislative Assembly.

Judicial Interpretation under Article 32.

In *Romesh Thapper v. State of Madras*⁹⁴ the Supreme Court has held that Art. 32 provides a guaranteed remedy for the enforcement of those rights and this remedial right is itself made a fundamental right by being in Part III of the Constitution. The Supreme Court is thus constituted the protector and guarantor of fundamental rights and it cannot consistently with the responsibility so laid upon it refuse to entertain applications seeking protection against infringement of such rights. A citizen can resort directly for such relief to the Supreme Court in the first instance and need not necessarily resort to the High Court under Art. 226 of the Constitution.

In *Rashid Ahmed v. Municipal Board, Kairna*⁹⁵, it has been held though the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs the powers given to the Supreme Court under Art. 32 are much wider and are not confined to issuing prerogative writs only. In the instant case the respondent Board having admittedly put it out of its power to grant a licence and having regard to the fact that there is no specific bye-law authorising the issue of a licence, an appeal under Sec. 318 to the Local Government which sanctioned the bye-laws is, in the circumstances of this case, not an adequate legal remedy. The fundamental right under Art. 19 (1) to carry on trade or business subject only to reasonable restrictions outlined in 19 (6) is jeopardised when once the licence to carry vegetable trade is given as a monopoly. Under the circumstances the Supreme Court felt it incumbent to direct the Municipal Board not to prohibit the petitioner from carrying on his vegetable trade subject to any future bye-laws to be made for taking out licences. The Board was further directed to withdraw the pending prosecution of the petitioner.

89. *B. C. Gupta v. Bijoyranjan Rakshit*, (1952) 56 C.W.N. 861.

90. *Hazari Lal Bhanna Mal v. State of H. P.*, A.I.R. 1953 H.P. 41.

91. *Bibhuti Bhushan Gosh v. Damodar Valley*, A.I.R. 1953 Cal. 59.

92. *Mahendra Bahdursing v. State of M. B.*, A.I.R. 1953 M.B. 236.

93. 8 D.L.R. 330 (S.C.).

94. 63 L.W. 929; 5 D.L.R. (S.C.) 42; 1950 S.C.J. 418; A.I.R. 1950 S.C. 124; (1950) 2 M.L.J. 390 S.C.

95. 1950 S.C.J. 324 (327).

In *Janardhan Reddy v. State of Hyderabad*⁹⁶ there was a conviction for murder by the Special Tribunal under the Hyderabad Special Tribunals Regulation, which was confined in appeal by the High Court before 20th January 1950, the date when the Supreme Court got jurisdiction over Hyderabad which had not joined the Indian Federation by then. Later an application under Art. 32 was filed before the Supreme Court to quash the conviction on the ground of misjoinder of charges and failure to assign counsel to accused for the defence, a writ of prohibition not to execute the petitioners and a writ of Habeas corpus to produce him. As the question of misjoinder failed in appeal the Supreme Court held that that matter could not be reopened by resort to Art. 32. Further it could not be laid as a rule of law that in every capital case where the accused was not represented by counsel the trial should be held vitiated. In the case in question the accused refused to have lawyers and so no counsel was assigned. It was further held that writs of certiorari and prohibition prayed for were hardly appropriate remedies as they were usually directed to an inferior court but when the Hyderabad High Court confirmed the conviction the Supreme Court had no territorial jurisdiction over it. In so far as the relief for Habeas corpus is concerned, it was also to fail since the High Court of Hyderabad upheld the conviction, and the deprivation of life or liberty of the petitioner has been brought about in accordance with a procedure established by law.

In *Himansher Bimal Mitra v. State*⁹⁷ it was posited that it was not necessary for a petitioner whose petition for a Habeas corpus is dismissed by the High Court to ask for leave of that court to move another petition to the Supreme Court. He could move the Supreme Court directly under Article 32.

In *B. B. L. Railway v. District Board*⁹⁸ it has been held that it cannot be held that if a person holding a public office or a corporation interferes with the proprietary right of a citizen it is the duty of the High Court under Art. 226 to afford adequate relief by issuing a writ of Mandamus to the wrong-doer. Infringement of proprietary right is fundamental in character and so would attract Articles 19 and 32. Such a right is guaranteed under Art. 32 and not under Art. 226 though the latter is wider in scope in that it can issue writs for enforcement of any fundamental right and also 'for any other purpose'. But Art. 32 itself is a guaranteed fundamental right of remedy and is compelling in its nature, while in Article 226 it is not so guaranteed. Therefore the High Court may in its discretion refuse to enforce under Art. 226 while the Supreme Court cannot refuse to exercise its jurisdiction under Art. 32.

In *Nain Sukh Das v. State of U. P.*⁹⁹ the Supreme Court has pointed out that the scope of the remedy under Art. 32 is restricted solely to enforcement of fundamental rights by Part III of the Constitution. Any right which the petitioners may have as rate-payers in the Municipality to insist that the Municipal Board should be legally constituted and the respondents who are not properly elected or nominated members should not be permitted to take part in the proceedings of the Board, is outside the purview of Art. 32, as such right, even if it exists, is not a fundamental right conferred by Part III.

In *Ram Narain Singh v. State of Delhi*¹⁰⁰ the Supreme Court has emphasised that in a question of Habeas corpus when the lawfulness or otherwise of the custody of the persons concerned is in question the documents containing

96. 6 D.L.R. (S.C.) 262: 1951 S.C.J. 320: A.I.R. 1951 S.C. 217.
97. A.I.R. 1951 Assam 143 (1): I.L.R. (1951) Assam 42.
98. A.I.R. 1952 Pat. 23: I.L.R. 130

Pat. 27.
99. (1933) S.C.J. 546: (1953) 2 M.L.J. 257: A.I.R. 1953 S.C. 384.
100. 1953 S.C.J. 326: A.I.R. 1953 S.C. 277: 1953 S.C.R. 652.

order of remand would be of vital importance and should be produced at the time of filing return. The Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings. Also detention of a person in custody after the expiry of the remand order without any fresh order of remand committing him to further custody while adjourning the case under Sec. 344, Cr. P.C., is illegal.

When a Habeas corpus petition had been rejected on merits, there can be no reconsideration of constitutional points and the case cannot be reopened for reasons that the grounds of detention are vague.¹

In *Aswin Kumar v. Arabinda Bose*² the Supreme Court (Patanjali Sastri, C. J., B. K. Mukherjee, S. R. Das, Bose and Ghulam Hussain, JJ.) left open the question as to whether a proceeding under Art. 32 would lie after an application under Art. 226 for the same relief on the same facts as had been rejected after due enquiry by a High Court. We have already noted that Art. 32 is independent of Art. 226 and no prior application is necessary under Art. 226 to enable resort to Art. 32. But the question arises, once resort is had to Art. 226 can Art. 32 be again invoked? It may be also pointed out that an appeal lies to the Supreme Court from an order under Art. 226 under a certificate of the High Court to that effect under Art. 132 (1) in all cases where there is a question of constitutional importance. Even otherwise an appeal lies upon a certificate of the High Court under Art. 134 (1) (c) and there is also the special leave of the Supreme Court under Art. 136 to exercise its discretion to entertain appeal from 'any final order in any cause or matter'.

When such is the position ordinarily where an appeal is the proper remedy, Art. 32 may not be resorted to directly by the affected citizen for the same infringement or right on the same set of facts. But resort to Art. 32 is a guaranteed fundamental right and it is proper to argue, that this remedy cannot be denied or lost merely because there was an unsuccessful prior resort to Art. 226 on the same set of facts. As has been stated in *Rashid Ahmed v. Municipal Board*³ the existence of an adequate legal remedy is not an absolute ground for refusing a writ under Art. 32 because the powers given to the Supreme Court under Art. 32 are much wider and are not confined to issuing prerogative writs only.

While Art. 32 can be resorted only where a fundamental right is involved Art. 226 can be invoked not only in such cases but also for 'any other reason' where it may be just and expedient for the court to interfere⁴.

In *United Motors (India) Ltd. v. State of Bombay*⁵ it has been held that the powers of the Supreme Court under Art. 32 and of the High Court under Art. 226 are concurrent and if the Supreme Court cannot refuse the application of any petitioner who comes before it complaining of contravention of fundamental rights, equally so the High Court cannot refuse to entertain the application of a person who comes before it under Art. 226 on the ground that his fundamental rights should be protected. The principle that a court will not issue a prerogative writ when an equally adequate alternative remedy is available, will not apply when a party seeks redress for infringement of

1. *Godavari Perulekar v. State of Bombay*, A.I.R. 1953 S.C. 52: 1953 (1) M.L.J. 203: 1953 S.C.J. 28.
2. 1952 S.C.J. 568: A.I.R. 1952 S.C. 369.

3. (1950) S.C.R. 566.
4. *Maqubunnissa v. Union of India* A.I.R. 1953 All. 477.
5. 55 Bom. L.R. 246 (D.B.), reversed in A.I.R. 1953 S.C. 252. (only on other points).

a fundamental right under Art. 226. Further an application under Art. 32 cannot be thrown out simply on the ground that the proper writ of direction has not been prayed for. In appeal in the instant case the Supreme Court has held that it is always desirable when relief under Art. 226 is sought on allegations of infringement of fundamental rights, that the court should satisfy itself that such allegations are well founded before proceeding further in the matter. Mere allegation without *prima facie* proof of infringement of a fundamental right cannot attract Art. 226 or Art. 32.

In *Sohi Sumsher Singh and another v. State of Pepsu*⁶ the petitioners were detenus under the Preventive Detention Act of 1950 for having published and distributed pamphlets which were couched in the most filthy and abusive language on the character and integrity of the then Chief Justice of Pepsu in the matter of recruiting officers for judicial posts and in deciding cases. On a writ under Art. 32 the Supreme Court held that the order of detention was quite illegal as the acts complained of could have no connection with the maintenance of law and order in the State. Undermining the confidence of the public in the pure administration of justice calls for a different proceeding but not detention impairing the personal liberty of a citizen—a fundamental right.

In *M. K. Gopalan v. State of M. P.*⁷ it was posited that where the question dealt with under petition under Art. 32 had been raised before the High Court at previous stages by means of applications under Art. 226 and decided against but no appeal to the Supreme Court had been taken against the orders therein, what the Supreme Court said now could not be taken as a pronouncement on any of the orders of the High Court. Nor was it intended that a direct approach under Art. 32 was sought to be encouraged except for very good reasons in all cases where there had been an adverse order under Art. 226 and no leave to appeal had been obtained therefrom.

In *Nain Sukh Das v. State of U. P.*⁸ it has been held by the Supreme Court that the scope of the remedy under Art. 32 is restricted only to enforcement of fundamental rights. Any right of rate-payers as such to have the Municipal Board legally constituted etc. is outside of the purview of Art. 32. Mere breach of rules under an Act when it is provided by a remedy under the Act cannot attract Art. 32⁹. It may be open to the petitioner in such a case to move the High Court under Art. 226 for a writ of Mandamus if the officers concerned have conducted themselves not in accordance with law or if they have acted in excess of their jurisdiction.

In *Virendra Singh v. State of Uttar Pradesh*¹⁰ the position of the absolute Muafi grants of lands made by the Rulers of the erstwhile States of Charkari and Sairola which were independent States under the paramountcy of the British Crown before the integration of the States into United Provinces of Vindhya Pradesh was in question. After the latter's accession to the Indian Dominion, the grant could not be revoked as an act of State by the State of Uttar Pradesh even with the consultation of the Government of India by virtue of the provisions in Arts. 31 (1) and 32 (2). The grantees are entitled to a writ restraining the State of Uttar Pradesh from giving effect to

6. A.I.R. 1954 S.C. 276.

7. A.I.R. 1954 S.C. 362.

8. A.I.R. 1953 S.C. 384.

9. *Cooverjee B. Barucha v. Ex-*

cise Commissioner, A.I.R. 1954 S.C. 220.

10. A.I.R. 1954 S.C. 447.

the executive order and directing it to give possession to the grantees if possession had been taken.

In *Gurusamy v. State of Mysore*¹¹ the Supreme Court refused to issue a meaningless writ as it could not be effective against the operation of a particular contract as the latter was to expire soon.

The Supreme Court has made it clear in *Hans Muller v. Supdt., Presidency Jail, Calcutta*¹², that the only persons who can impugn any given piece of legislation are those who are aggrieved thereby. A person who is not a member of a certain class and is not aggrieved, cannot impugn the Act on the ground of unreasonable classification contravening Art. 14.

When a liability of the assessee to pay evaded tax arises under the settlement voluntarily entered into by him with the Government, such a settlement cannot be questioned by resort to a petition under Art. 32¹³.

A petitioner cannot be allowed to urge grounds which he had not taken in the petition under Art. 32¹⁴.

The circumstance that disciplinary proceedings are pending against a Government servant may be treated by the High Court as a good ground for refusing to interfere under Art. 226, though such a circumstance is not an absolute bar¹⁵. But when Art. 32 is invoked that is no answer at all.

It has been posited by the Supreme Court in a case¹⁶ that the Government as the owner of the land with its minerals is *prima facie* entitled to lease it out to any body and no person can plead any violation of any fundamental right if the lease is given to another.

The freedom of inter-State and intra-State trade or business embodied in Art. 301 is not a fundamental right and hence cannot be enforced under Art. 32¹⁷.

The right of any person to seek remedy under Art. 32 in respect of any violation of his fundamental rights is in no way curtailed or affected by the fact that an actual decision of the Supreme Court on an application under Art. 32, is, in effect, nullified by appropriate and competent legislative measures¹⁸. In the instant case Sec. 79 of the Orissa H. R. E. Act 2 of 1952 as amended in 1954, was therefore held not open to any objection on the ground of legislative incompetence¹⁹.

In the matter of the powers of the Supreme Court to act under Art. 32, it was posited in *Hari v. Dy. Commissioner of Police* that it was not for the court to examine afresh objectively the materials on which prior orders of discharge or acquittals were made when the legislature had left it to the subjective satisfaction of the authority passing an order under Sec. 57 of the Bombay Police Act.

If a petitioner seeking remedy under Art. 32 comes to court with a false

11. A.I.R. 1954 S.C. 592.

12. A.I.R. 1955 S.C. 367.

13. *Babu Rao Narayana Rao Sanas v. Union of India*, A.I.R. 1955 S.C. 257.

14. *Tropical Insurance Co. Ltd. v. United India*, A.I.R. 1955 S.C. 789.

15. *R. Anantha Narayanan v. General Manager, Southern Railway*, A.I.R. 1956 Mad. 220.

16. *Bhagwan Das Ganga Sahai v. Union of India*, A.I.R. 1956 S.C. 175.

17. *Ramchandra v. State of Orissa*, A.I.R. 1956 S.C. 298. 1956 S.C.J. 293.

18. *Sadasib Prakash Brahmachari, Trustee of Mahiprakash Muth v. State of Orissa*, A.I.R. 1956 S.C. 432; 1956 S.C.J. 397.

19. A.I.R. 1956, S.C. 559.

statement that alone may be a sufficient reason for throwing out his application²⁰.

Article 32 is by itself a fundamental right and it guarantees the enforcement of the rights scheduled in Part III of the Constitution²¹. The existence of an adequate legal remedy can be taken into consideration in granting a writ²². Under Art. 32 the powers are wide enough to grant remedies adequately apart from prerogative writs, in the nature of writs, directions, orders etc.²² Under Art. 32 the powers are wide enough to grant remedies adequately apart from prerogative writs, in the nature of writs, directions, orders etc.²² No writ lies in Habeas corpus when there has been a conviction in a criminal trial²³. There can be a direct writ filed in Supreme Court without giving to the High Court in the first instance or when the High Court refuses grant of writ²⁴. When a High Court can refuse to enforce a fundamental right under Art. 226, Art. 32 is so compelling in nature that the Supreme Court cannot make such a refusal²⁵. What is not a fundamental right cannot be enforced under Art. 32²⁶. Documents pertaining to the detention of persons can be scrutinized by the court which should have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of proceedings²⁷.

When Habeas corpus petition has been rejected on merits there can be no reconsideration of constitutional points and the case cannot be reopened on the reasoning that the grounds are vague²⁸.

Resort to Article 32 being a fundamental right by itself, that remedy cannot be denied or lost merely because there was an unsuccessful prior resort to Art. 226 on the same set of facts²⁹. But in *Aswin Kumar v. Aravinda Bose*³⁰ the question was left open. An appeal lies from an order under Art. 226 to the Supreme Court upon a certificate of the High Court under Art. 132 (1) or by special leave of the Supreme Court under Art. 136. Yet it is not proper that these factors should in any way prejudice or jeopardise resort to Art. 32 directly even after an adverse order under Article 226. Article 226 can be invoked for 'any other purpose', even other than fundamental rights^{30a}. Powers of the Supreme Court under Art. 32 and the High Court under Art. 226 are concurrent and either cannot refuse to entertain writs for enforcement of fundamental rights³¹.

An order of detention cannot stand in answer to a writ when the order has no relation at all to the maintenance of law and order in the state³². In *M. K. Gopalan v. State of M. P.*³³ it has been held that where applications under Art. 226 have been dismissed and no appeal has been filed therefrom

20. *Durga Prasad Khaitan v. Commercial Tax Officer*, A.I.R. 1956 Cal. 596.

21. *Romesh Thapar v. State of Madras*, A.I.R. 1950 S.C. 124.

22. *Rashid Ahmed v. Municipal Board*, 1950 S.C.J. 224.

23. *Janardhan Reddy v. State of Hyderabad*, A.I.R. 1951 S.C. 217.

24. *Himanshu Bimal Mitra v. State*, A.I.R. 1951 Ass. 143 (1).

25. *B. B. L. Railway v. Distt. Board*, A.I.R. 1952 Pat. 23.

26. *Nain Sukh Das v. State of U.P.* A.I.R. 1953 S.C. 384.

27. *Ram Narain Singh v. State of*

Delhi, A.I.R. 1953 S.C. 277.

28. *Godavari Paulkar v. State of Bombay*, A.I.R. 1953 S.C. 52.

29. See *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566.

30. A.I.R. 1952-S.C. 369.

30a. *Maqubunnissa v. Union of India*, A.I.R. 1953 All. 477.

31. *United Motors (India, Ltd.) v. State of Bombay*, 55 B.L.R. 246, reversed in A.I.R. 1953 S.C. 252 only on other points.

32. *Sohi Shamsher Singh and another v. State of Pepsu*, A.I.R. 1954 S.C. 276.

33. A.I.R. 1954 S.C. 362.

a direct approach under Art. 32 ought not to be encouraged except for very good reasons³³. A right such as a right of rate-payers to have the Municipality duly constituted is not a guaranteed right and hence Article 32 will not apply in such a case³⁴. A Crown grant which vests rights cannot be later revoked by an act of state and a writ can successfully lie to avert acquisition of the same³⁵. No meaningless writ which could not be effective, e.g., against the operation of a particular contract expiring soon, should be granted³⁶.

The Supreme Court has made it clear in *Hans Muller v. Superintendent, Presidency Jail, Calcutta*³⁷ that the only person who can impugn any given piece of legislation are those who are aggrieved thereby. A petitioner cannot under Art. 32 urge grounds not already stated in the petition³⁸.

The Supreme Court has posited in a case that no person has any fundamental right to move by a writ that the Government as owner of a land with its minerals, should lease to him in preference to another. It is the Government's prerogative as owner to choose its lessee³⁹.

The freedom of inter-State and intra-State trade or business embodied in Art. 301 is not a fundamental right and hence cannot be enforced under Art. 32⁴⁰.

The right of any person to seek remedy under Art. 32 in respect of violation of any of his fundamental rights is in no way curtailed or affected by the fact that an actual decision of the Supreme Court on an application under Art. 32 is in effect nullified by appropriate and competent legislative measures⁴¹. In the instant case Sec. 79 of the Orissa H. R. E. Act 2 of 1952 as amended in 1954, was therefore held not open to any objection on the ground of legislative incompetence⁴¹.

In the matter of the powers of the Supreme Court to act under Art. 32, it was posited in *Hari v. Deputy Commissioner of Police*⁴², that it was not for the court to examine afresh objectively the materials on which the prior orders of discharge or acquittals were made when the legislature had left it to the subjective satisfaction of the authority passing an order under Section 57 of the Bombay Police Act.

If a petitioner seeking remedy under Art. 32 comes to court with a false statement that alone may be sufficient reason for throwing out his application⁴³. Article 32 predicates enforcement of rights and not mere declarations of rights which is not permissible⁴⁴.

Where orders under certain Acts are challenged as erroneous on merits but the law under which they are committed are not challenged, Art. 32

34. *Nain Sukh Dass v. State of U.P.*, A.I.R. 1953 S.C. 384.

35. *Virendra Singh v. State of U.P.*, A.I.R. 1954 SC. 447.

36. *Gurusamy v. State of Mysore*, A.I.R. 1954 SC. 592.

37. A.I.R. 1955 SC. 367.

38. *The Tropical Insurance Co. Ltd. v. Union of India*, A.I.R. 1955 SC. 789.

39. *Bhaghvandas Ganga Sahai v. Union of India*, A.I.R. 1956 SC. 175.

40. *Ramchandra v. State of Orissa*,

A.I.R. 1956 SC. 298: 1956 S.C.J. 293.

41. *Sadasib| Prakash Brahmachari, Trustee of Mahi Prakash Muth v. State of Orissa*, A.I.R. 1956 S.C. 432: 1956 S.C.J. 397.

42. A.I.R. 1956 S.C.J. 559: 1955 S.C.J. 599.

43. *Durga Prasad Khaitan v. Commercial Tax Officer*, A.I.R. 1956 Cal. 596.

44. *Amrat Prasad R. Antani v. State of Kutch*, A.I.R. 1956 Kutch 12.

cannot apply. Only an appeal on merits is the proper remedy in such cases⁴⁵. It is only on facts admitted or taken as proved that the question of the violation of a fundamental right can be decided by the Supreme Court under Art. 32 because when facts are in dispute, the matter has to be enquired into and decided by proper legal proceeding⁴⁶. But if an illegal tax is levied the writ remedy is open⁴⁸. An order of transfer of an income tax case and acquiescence and submission to the new jurisdiction disentitles any relief under Art. 32⁴⁷.

Findings based on evidence by appropriate authority cannot be opened in a writ proceeding unless it is shown there had been really no legal evidence⁴⁸. It is only on facts admitted or taken as proved that the question of the violation of a fundamental right can be decided by the Supreme Court under Art. 32 since when facts are in dispute the matter has to be enquired into and decided by the usual and proper legal proceedings⁴⁹.

Provisions like Art. 328 (3) are not mandatory and non-compliance (i.e., irregularity in consultation with the Public Services Commission or even the absence of consultation) does not afford a cause to move under Art. 32⁵⁰.

Resume of Judicial Interpretation (1) under Art. 226.

The writs referred to in Art. 226 are intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it or in violation of the principles of natural justice or refuse to exercise a jurisdiction vested in them or there is an error apparent on the face of the record and such act, omission, error or excess has resulted in manifest injustice⁵¹. The High Court cannot convert itself as a court of appeal in a proceeding under Art. 226⁵¹. When a statute creates new rights and liabilities, prescribes a procedure and remedies for redress, it is the latter that must be resorted to generally and not the extraordinary remedy available under Art. 226⁵¹. In *Basappa v. Nagappa*⁵² it was held, "In view of the expression in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law nor feel oppressed by any difference or change of opinion expressed in particular cases by English judges; we can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise in the matter of granting such writs in English law."

The two limitations placed on the powers of the High Court under Art. 226 are :

- (1) The power is to be exercised throughout the territories in relation to which it exercises jurisdiction.

45. *Gulabdas & Co., Asstt. Commr. of Customs*, A.I.R. 1957 S.C. 733.

46. *Kailasanath v. State of U. P.*, (1957) 8 S.T.C. 358 (S.C.).

47. *Pannalal Binjraj v. Union of India*, A.I.R. 1957 S.C. 379, relies on A.I.R. 1927 Mad. 130. See Halsbury's 'Laws of England', 3rd Ed., Vol. II, p. 140, para 265.

48. *Bhatnagar & Co. v. Union of*

India, A.I.R. 1957 S.C. 478.

49. *Kailash Nath and others v. State of U.P.*, A.I.R. 1957 S.C. 790.

50. *State of U. P. v. Manbodhan Lal Srivastava*, A.I.R. 1957 S.C. 912.

51. *Veerappa Pillai v. Raman and Raman Ltd.*, A.I.R. 1952 S.C. 192; 1952 S.C.R. 583; (1952) S.C.J. 261.

52. (1954) S.C. A. 620.

- (2) The person or authority to whom the High Court is empowered to issue writs must be within these territories⁵³. The remedy under Art. 226 is discretionary with the High Court⁵³. The latter may refuse to act if the aggrieved party can have an adequate or suitable relief elsewhere⁵³.

In Habeas corpus proceedings the court should consider the legality or otherwise of the detention Act at the time of the return and not with reference to the time of the institution of the proceedings. If legality is found to be lacking, the detenu must be released⁵⁴. As it is a question of the personal liberty of a person, there must be a scrupulous observance of the forms and rules of law⁵⁴.

When the State seeks to interfere with the contractual rights of a citizen and to this end acts under a statute which in fact does not affect such rights a writ of mandamus can issue prohibiting the State from interfering with the rights of the petitioners⁵⁵.

The court cannot function as a court of appeal in a mandamus proceeding. It has to judge only within the restricted sphere of a writ proceeding as to the legality or otherwise of the judgment of the authority impugned. It cannot substitute its wisdom for the persons to whose judgment the matter had been entrusted by law⁵⁶. A writ of mandamus can issue to compel a public act being done in accordance with the law which regulates its performance. No such writ can lie if it will be ineffective or meaningless⁵⁷. In such mandamus matters the court should refuse to sit as a court of appeal to correct a mere technical error or irregularity which does not basically invalidate the order of the impugned authority⁵⁷.

The court should not grant a writ of certiorari to quash the decision of an inferior court in its jurisdiction merely on the ground that the decision is wrong. Want of jurisdiction or excess of it or violation of principles of natural justice have to be made out to entitle a quashing of the order⁵⁸. Such want of jurisdiction may arise from the nature of the subject matter or from the absence of some essential preliminary or upon the existence of some particular facts collateral to the actual matter, which are conditions precedent to any assumption of jurisdiction. Once it is conceded the court has jurisdiction, remedy appropriate in law should be resorted to and not a writ. For a court has jurisdiction to decide rightly as well as wrongly⁵⁸. There can be no erroneous decision of certain facts as if existing to give a tribunal an assumption of jurisdiction. If the legislature empowers the tribunal to judge a preliminary set of facts to give itself jurisdiction and the tribunal decides it, it is not one without jurisdiction. So no writ of certiorari can then lie⁵⁸. An appellate tribunal has an inherent power to determine preliminary issue as to the appellant's *locus standi* if the appeal is in form and is competent. If on such preliminary enquiry there is a wrong decision a writ of *certiorari* is not the remedy⁵⁸.

53. *Rashid v. I. T. Investigation*, (1954) S.C.R. 738 1954 S.C.J. 264.

54. *Ram Narayan v. State of Delhi*, A.I.R. 1953 S.C. 277 (1953) S.C.R. 652: 1953 S.C. J. 326.

55. *Chhota Bai & others v. State of M. P.*, A.I.R. 1953 S.C. 108; (1953) S.C.R. 476: 1953 S.C.J. 96.

56. *Vice Chancellor and others v. S.K. Ghose and others*, 1954 S.C.J. 706: (1954) S.C.R. 883: (1954) S.C.A. 311.

57. *Gurusamy v. State of Mysore and others*, (1955) 1 S.C.R. 306: (1954) S.C.A. 993.

58. *Ebrahim Aboobaker v. Custodian General*, A.I.R. 1952 S.C. 319: 1952 S.C.R. 696: 1952 S.C.A. 501.

So no writ of certiorari will lie merely on the ground that the decision of the inferior tribunal is erroneous⁵⁹. The writ can be available only if the decision is without jurisdiction or there is an error apparent on the face of the record or if there is any violation of any principle of natural justice⁶⁰. The writ of certiorari is available only to remove or adjudicate on the validity of 'judicial acts', which latter term includes the exercise of quasi judicial acts of administrative bodies or other authorities or persons obliged to exercise such functions in contradistinction to purely ministerial acts⁶⁰. A writ of certiorari is given only in a supervisory capacity and not as an appellate body. Any preliminary enquiry which enable conferral of jurisdiction, if done in disregard of rules of procedure or violation of the principles of natural justice, invites a writ of certiorari⁶⁰. If the error in decision is manifestly apparent on the face of the proceeding, a writ can lie. Such an error may be based on clear ignorance or disregard of the legal provisions. Art. 226 empowers High Courts to quash decisions of election tribunals and also can give directions under Art. 227⁶¹. The Supreme Court can hear an appeal from the decision of an Election Tribunal under Art. 136, *vide* Art. 329 (b). A writ under Art. 226 is not fettered by technical considerations in respect to form and procedure as in England⁶¹. As the writ is only against the record it does not matter if the tribunal has become *functus officio*⁶¹. A writ of certiorari cannot be issued by the court acting as a court of review or appeal. Such a writ can issue when there is an error apparent on the face of the record as when it is based on sheer ignorance or disregard of the provisions of law⁶¹. The error must be patent. Mere wrong decisions will not do. What is error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and this must be left to be determined judicially on the facts of each case.

The other remedy being available is no answer to a writ under Art. 226 when such remedy is *ultra vires* in law and there is want of legislative competency⁶². A notice under the Bihar Sales Tax Act calling upon a company to forthwith register itself as a dealer and to submit a return and deposit the tax in the treasury, places considerable hardship on the company, not to speak of harassment. The Act is void under Art. 265 read with Art. 286 and hence a writ lies in such cases⁶².

Broadly speaking a writ of prohibition will lie when the proceedings are to any extent pending and a writ of certiorari for quashing after they have terminated in a financial decree⁶¹. The right of a voter who is denied the right to exercise his right of franchise is not limited only to a claim for damages—he can resort to a writ under Art. 226, even though an election petition is maintainable⁶³. In quasi judicial proceeding the maxim that a man shall

59. *Parry & Co. v. Commercial Employees' Assn.*, A.I.R. 1952 S.C. 179: 1952 S.C.R. 519: 1952 S.C.J. 275.

60. *Basappa v. Nagappa*, (1955) 1 S.C.R. 250: A.I.R. 1954 S.C. 440: 1954 S.C.J. 695, reversing *Nagappa v. Basappa*, A.I.R. 1954 Mys. 102.

61. *Hari Vishnu v. Syed Ahmed*, (1956) 1 S.C.R. 1104: 1955

S.C.J. 267: 1955 S.C.A. 105: A.I.R. 1955 S.C. 233.

62. *Bengal Immunity Co., Ltd v. State of Bihar*, A.I.R. 1955 S.C. 661: 1955 S.C.J. 672: 1955 S.C.A. 1140, reversing A.I.R. 1953 Pat. 87.

63. *Kanglu Banla v. Chief Executive Officer*, A.I.R. 1955 Nag. 49 F.B.

not be judge in his own case is very difficult to apply⁶⁴. In cases where the inferior tribunal has to decide a preliminary issue before it takes up jurisdiction, in such cases in certiorari proceedings a court can enquire into the correctness of the decision of the inferior tribunal as to the collateral fact. If it is an erroneous decision it can be set aside⁶⁵. Where the tribunal is empowered to determine finally the preliminary facts the decision even if wrong cannot be corrected by a writ of certiorari. In cases where the fact in question is part of the very issue which the inferior tribunal has to enquire into no writ can proceed though it may be an erroneous conclusion of the inferior tribunal⁶⁵.

The jurisdiction of the High Court under Art. 226 exists to protect the rights of citizens which have been infringed within its jurisdiction and so a writ can be addressed only to those who are amenable to its jurisdiction⁶⁶. It has been held in the instant case⁶⁶ that the T. C. High Court has jurisdiction to issue a writ under Art. 226 against the authorised official appointed to work in Travancore under Sec. 6 of the Travancore Taxation on Income Act by the Indian Income Tax Investigation Commission having its office in New Delhi, if the authorised official acts contrary to the law in discharge of his duties⁶⁶.

Ordinarily a writ of mandamus is not issued against a private individual. It can only arise in the matter of public official duty⁶⁷. The eviction of a displaced person if it is illegal, a writ of mandamus can be issued against the State. But if the property is in the possession of another displaced person who is not in collusion with the Union of India no writ of mandamus or an order in the nature of mandamus can be made against him⁶⁷.

When there is an allegation of *mala fides* attributed against a tribunal, the High Court cannot dismiss the petition *in limini* without giving a hearing to the party⁶⁸. When on a question of fact, the High Court and the Supreme Court give a concurrent finding, the Supreme Court and the High Court can refuse to issue a writ. A writ of certiorari under Art. 226 is not to be given as a matter of course⁶⁹.

Press notifications unless they are issued under statutory provisions have no legal force and in such a case a writ of certiorari will not apply⁷⁰. Where the High Court is satisfied that an inferior court or authority has exceeded its jurisdiction, and that absence of jurisdiction is patent a writ of prohibition will issue⁷¹. But where the defect is not apparent and the facts have to be investigated and determined the court can in its discretion refuse the writ⁷¹.

Article 226 is wider in scope than Sec. 49, Specific Relief Act, and empowers the High Court for enforcing any of the fundamental rights conferred under Part III and for 'any other purpose', that is to say the enforcement of

64. *P. M. Brahmaddattan Namboodripad v. Cochin Dewaswom Board*, A.I.R. 1956 T.C. 19 (F.B.); I.L.R. 1955 T.C. 741 (F.B.).

65. *Raman & Raman Ltd. v. State of Madras*, A.I.R. 1956 S.C. 463 : 1956 S.C.J. 368 : 1956 S.C.A. 526.

66. *A. Thangal Kunju v. M. Venkatachalam Pillai*, A.I.R. 1956 S.C. 246 : 1956 S.C.A. 259 : 1956 S.C.J. 323 : (1955) 2 S.C.R. 1196.

67. *Sohanlal v. Union of India*, A.I.R. 1957 S.C. 529 : 1957 S.C.A. 417 : (1885) 25 L.T. Q.B. 61 relied on.

68. *British India Corporation Ltd. v. Industrial Tribunal*, A.I.R. 1957 S.C. 354.

69. *Alison v. B. L. Sen*, A.I.R. 1957 S.C. 227.

70. *Ved Prakash v. I. T. Commr.*, A.I.R. 1957 All. 711.

71. *G. Thirupathayya v. G. Appala Naidu*, A.I.R. 1957 And. Pr. 777.

ordinary legal rights and duties⁷². For the issue of a writ of mandamus the existence of a specific legal right is a necessary qualification in the applicant but it is not necessary that the right must reside in the individual applicant and no one else⁷². There must have been a demand for the relief and its refusal by the authority concerned for the grant of mandamus⁷². In deciding writs under Art. 226 the High Court cannot assume the powers of an appellate court and decide whether the evidence is sufficient in quantity to support a finding of fact⁷³.

It is no doubt true that the existence of an alternative remedy is not an absolute bar to having recourse under Art. 226 but if a party has availed himself of the ordinary remedies provided for by a special Act, he cannot thereafter turn round and once again begin from the bottom by challenging the original order under Art. 226⁷⁴. Award of a tribunal based on no evidence can be interfered with under Art. 226⁷⁵. If the determination of a jurisdictional issue by the appellate tribunal is wrong the latter cannot substitute its award for that of the tribunal of the first instance⁷⁵.

It is well established that if an administrative authority decides a matter by taking into account extraneous considerations, the order which the authority purports to pass is an order passed without jurisdiction and it must be taken in the eye of law that the authority has not exercised its power at all⁷⁶.

It is only on facts admitted or taken as proved that the questions of violation of a fundamental right can be decided under Art. 32. For, when facts are in dispute the matter has to be enquired into and decided by proper legal proceedings⁷⁷. But this aspect of the law has been agreeably reviewed by the Supreme Court in *K. K. Kochunni Mopil Nair v. State of Madras*⁷⁸ where it was recognised that disputed questions of fact could be enquired into under Art. 32. [*Vide infra* for fuller details.] If a tax is levied without legal authority a writ lies in that regard⁷⁷. There can be no infringement of a fundamental right if the impugned orders are passed under valid law and with jurisdiction⁷⁹. So if a particular decision is erroneous on facts or merits, the remedy is by way of an appeal⁷⁹.

In spite of the fact that making of a reference by the Government under the Industrial Disputes Act is the exercise of its administrative powers, that is not destructive of the rights of an aggrieved party to show that what was referred was not an 'industrial dispute' at all and therefore the jurisdiction of the industrial tribunal to make the award can be questioned, even though the factual existence of a dispute may not be subject to a party's challenge⁸⁰.

72. *Venugopalan v. Vijayawada Municipality*, A.I.R. 1957 And. Pr. 833.

73. *Challapakri Rao v. Dakshinamoorthy*, A.I.R. 1957 And. Pr. 900.

74. *Messrs. S. N. Transport, Co. v. State Transport Authority*, A.I.R. 1957 Cal. 638.

75. *Modern Match Industries v. L. A. T. I.*, A.I.R. 1957 Madras 688. See *Supdt. of Collieries, Giridh v. Dy. Commr., Hazaribagh*, A.I.R. 1957 Pat. 647.

76. *Suknandan Thakur v. State of*

Bihar, A.I.R. 1957 Pat. 617, following *King v. Board of Education*, (1910) 2 K.B. 165.

77. *Kailash Nath v. State of U.P.*, A.I.R. 1957 S.C. 790.

78. Petn. No. 443/55 Supreme Court Judgment 4-3-1959.

79. *Gulabdas and Co. v. Asstt. Commr. of Customs*, A.I.R. 1957 S.C. 733.

80. *Newspapers Ltd. v. State Industrial Tribunal*, A.I.R. 1957 S.C. 532; 1957 S.C.J. 566; 1957 S.C.A. 390.

The Bombay Land Acquisition has made a specific provision to the effect that the determination on the question referred to in Secs. 5 and 6 of the Act by the State Government shall be conclusive evidence of the declaration so made. But that does not mean that the jurisdiction of the High Court under Art. 226 or of the Supreme Court under Art. 32 or an appeal has been impaired. But these latter special powers cannot extend to reopening a finding by the Requisition Act. The legislature in its wisdom has made these declarations conclusive and it is not for the Court to question that wisdom⁸¹. If findings on facts have been made by concurrent Courts it cannot be questioned under Art. 32. It is easy to aver that the finding is based on no evidence but difficult to establish it⁸². If goods had been seized in accordance with law as a result of the findings by the relevant authorities competent to hold enquiry under the Sea Customs Act, it was no good urging that the Supreme Court should ask the authorities to exercise discretion in the petitioner's favour. Acquiescence and submission to jurisdiction of a tribunal cannot be later set at naught by resort to a writ under Art. 32, on the plea that the order of transfer under S. 7-A of the Income Tax Act to another Income Tax Officer is illegal⁸³. Where there is a perfectly simple, short and neat question of law, a writ of prohibition to the High Court is appropriate⁸⁴. But it is not desirable to lay down any definite rule when a person should go to the tribunal or when he should come to the High Court for prohibition where the objection is that the tribunal had no jurisdiction⁸⁴.

A person whose fundamental right is infringed by a private individual must seek his remedy under the ordinary law and not under Art. 32 or Art. 226 of the Constitution⁸⁵.

Art. 320 (3) (c) of the Constitution does not confer any rights on a public servant so that the absence of consultation should not afford him a cause of action in a court of law, or entitle him to relief under the special powers of a High Court under Art. 226 or of the Supreme Court under Art. 32. It is not a right which could be recognised and enforced by a writ. On the other hand Art. 311 of the Constitution has been construed as conferring a right on a civil servant of the Union or a State which he can enforce in a court of law. Hence if the provisions of Art. 311 have been complied with he has no remedy against any irregularity that the State Government may have committed in not complying with the provisions of Art. 320 (3) (c)⁸⁶.

While it is true that the existence of another remedy does not affect the jurisdiction of the court to issue a writ, yet the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs. And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Art. 226 unless there are good grounds therefor⁸⁷.

81. *Lilavati Bai v. State of Bombay*, A.I.R. 1957 S.C. 521 : 59 Bom. L.R. 1934.

82. *Bhatnagar & Co. v. Union of India*, A.I.R. 1957 S.C. 478.

83. *Pannalal Binraj v. Union of India*, A.I.R. 1957 S.C. 397.

84. *R. T. Tottenhani*, (1956) 2 All. E.R. 863 (8); *Tejraj Chhoganlal Gandhi v. State of M. B.*, A.I.R. 1958 Madh. Pra. 115.

85. *P. D. Sham Dasani v. Central Bank of India* A.I.R. 1952 S.C. 59.

Ram Krishna v. Roshanlal and others A.I.R. 1952 All 697.

86. *State of U.P. v. Manbodhanlal Srivastava*, A.I.R. 1957 S.C. 912.

87. *Union of India v. T. R. Varma*, A.I.R. 1957 S.C. 882; A.I.R. 1950 S.C. 163; A.I.R. 1954 S.C. 207 relied on.

In *Prem Singh v. Dy. Custodian General of Evacuee Property*⁸⁸, the Supreme Court held in the instant case there were no errors apparent on the face of the record for issuance of a writ of certiorari. The errors if at all, were those of fact and even if they were stretched as some error of law, they were of a nature that could be corrected by a court of appeal. The error did not render the order a 'speaking order' showing a clear ignorance of disregard of the provisions of law, so as to be amenable to correction by a writ of certiorari.

The writs referred to in Art. 226 are intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it or in violation of the principles of natural justice or refuse to exercise jurisdiction vested in them or there is an error.

No certiorari can lie if there is no error apparent on the face of the record¹⁸. In a case arising under the Administration of Evacuee Property Act (1950)¹⁹ the Supreme Court found merely errors of fact. Even if these were construed as errors of law, they were but mere errors of law which might be corrected by a court of appeal, but which did not render the order a 'speaking order' showing a clear ignorance or disregard of the provision of law, so as to be amenable to correction by a writ of certiorari^{88a}.

In cases where a person submitted to the jurisdiction of a tribunal different considerations may arise when a writ of certiorari is claimed^{88b}. But even in those cases it may be said that if there is an initial want of jurisdiction the fact that the petitioner failed to raise an objection to the want of jurisdiction in the trial court will not disentitle him to a relief by the High Court under Art. 226^{88c}.

It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ^{88c}. The Supreme Court has held in *Union of India v. T. R. Varma*⁸⁹ that it is true that the existence of another remedy does not affect the jurisdiction of the court to issue the writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs. And where such remedy exists it will be a sound exercise of discretion to refuse to interfere in a petition under Art. 226.

The control which the High Court exercises under Art. 226 through a writ of certiorari over judicial or quasi judicial tribunals or bodies being not in an appellate but supervisory capacity, the High Court does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. In such circumstances the High Court will issue a writ of certiorari only for correcting errors of jurisdiction⁹⁰. A decision

88. A.I.R. 1957 S.C. 804: 1958 S.C.J. 29.

88a. *Prem Singh v. Deputy Custodian General, Evacuee Property*, A.I.R. 1957 S.C. 804.

88b. *Shyam Kishore Kapur v. The Licensing Board (Excise)*, A.I.R. 1957 All. 773.

88c. *N. K. C. Syed Mahmud Raut v. Deputy Commercial Tax*

Officer Tirukkovilur (1958) 1 M.L.J. 30.

89. A.I.R. 1957 S.C. 882 relying on A.I.R. 1950 S.C. 163: A.I.R. 1954 S.C. 207.

90. *Qamm Zaman Khan v. Sarju Hajam*. A.I.R. 1957 Pat. 725. Also see *Bhanuram Pegu v. Commissioner of Hills Division*, A.I.R. 1957 Assam 182.

even if wrong on facts or law cannot be corrected by a writ of certiorari. It is not liable to be questioned on the ground that it was erroneous on the merits or that it was reached without considering some aspects which it ought to have considered, unless the failure to consider them is of such a character as to amount to their being no exercise of judgment at all¹⁶. Consequently the High Court in exercising jurisdiction under Art. 226 will not take notice of subsequent events or change in the law which may or may not invalidate the impugned order.⁹¹

Before a person aggrieved is refused a relief to which he would otherwise be entitled on the ground of acquiescence in the wrong complained of, it is necessary to establish that he knew or ought to have known his right which he omitted to assert¹⁸. Thus where the applicant under Art. 226 did not take up the contention that the Regional Transport Authority did not have jurisdiction to deal with an application for variation in the permit due to the ignorance of the true legal position which was shared by the statutory authorities, the Government and even the court, and that was settled authoritatively subsequently by a Division Bench, it is not just to apply the rule of acquiescence and disallow the petitioner from urging this plea.

When a question arises whether an authority created by an Act is a *quasi judicial* tribunal, then one has to see if the tribunal has a duty to decide the dispute in a judicial manner and declare the rights of parties in a definitive judgment⁹². To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in support of it and that the authority has to decide the matter on a consideration of the evidence produced before it. If the decision is to be made by the authority on a purely subjective view of the matter then it is the exercise of the administrative and executive functions. On the other hand if the decision is to be made objectively on the impersonal and impartial consideration of facts and law it is a judicial function. When judicial function is to be exercised by an administrative tribunal then the tribunal is termed a quasi judicial tribunal as distinct from an ordinary court. It cannot be laid down as an inflexible rule of law that the Supreme Court must deny the writ when an inferior court or tribunal arrived at a conclusion which disards all principles of natural justice and all accepted rules of procedure⁹³. There is no rule with regard to certiorari as there is with mandamus that it will lie only where there is no other equally effective remedy. Provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by the statute¹⁹. The rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law. The superior Court will readily issue a certiorari in a case where there has been a denial of natural justice before a court of summary jurisdiction⁹³. If an inferior court will readily issue a certiorari in a case where there has been a denial in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the Supreme Court's sense of fairplay, the Supreme Court has to issue the writ and correct the error, despite the fact

91. *Arunachalam Pillai v. Messrs. Southern Roadways Ltd., Madurai* (1958) 1 M.L.J. 1.

92. *Sita Ram Gurdas Mal v. Collector of Central Excise, New Delhi*, A.I.R. 1958 Punj. 35.

that the remedy of appeal was ignored. Even if appeal was resorted to, there is no bar to the Supreme Court's interference in what was a mere nullity⁹³.

The Industrial Tribunal is a creation of statute and so if it passes an order which it had no jurisdiction to pass, a writ can lie to quash the same⁹⁴.

The power under Art. 226 is circumscribed by certain limitations. Thus the High Court will not convert itself into a court of appeal on merits unless the decision is erroneous on the face of the record, and in matters involving the use of discretion and judgment entrusted to an authority by law, it will not direct that authority to pass orders or itself pass orders on merits, or where complicated questions of fact have to be determined, it will not turn itself into a trial court and determine those questions of fact or investigate title, nor will it issue ineffective writs⁹⁵. The High Court will exercise its discretion whether to exercise the power under Art. 226 or not, in case an alternative remedy exists. This is only a rule of discretion and expediency and does not arise due to any want of jurisdiction or limitation on the power of the High Court.

A petition under Art. 226 cannot be deemed to be an appeal against an impugned order suspending a civil servant for a period of one year by way of punishment. If there is nothing on record to show that over and above the opportunities which were made available to the petitioner to show that he was innocent, he wanted further opportunities which were denied, he cannot complain on that score or that there has been a violation of the rules of natural justice in the conduct of the inquiry into the charge against him⁹⁶.

Where an Act has created its own hierarchy of officers and appellate authorities to administer the law the High Court has no concern with the manner in which the powers have been exercised so long as those authorities have functioned within the letter and spirit of law⁹⁷. Mere formal or technical errors, even though of law, will not be sufficient to attract a writ of certiorari. It must be an error on the face of the record and not every error either of act or of law which can be corrected by a superior court in exercise of its statutory powers as a court of appeal or revision.

For a mandamus to issue for the enforcement of a statutory right it must appear that the statute in question imposes a duty⁹⁸. When once mandamus is rejected on the ground that no prior demand for justice was made, no second application can be entertained in any circumstances, even though, since the rejection of the first application a demand for justice may have been made. This rule has been applied by judges in England inexorably⁹⁹. But this rule is not followed in practice in India¹⁰⁰.

Where the assessment was made on instructions from superior authority and there was failure to give the assessee opportunity to meet that opinion, the Supreme Court held that the appellant had not a fair deal. The procedure

93. *The State of U.P. v. Mohamad Nooh*, A.I.R. 1958 S.C. 86.

94. *Gordon Woodroffe & Co. v. S. Venugopal* (1958) 1 M.L.J. 164.

95. *Harnath Rathi v. State of Hyderabad*, A.I.R. 1958 Andh. Prad. 222.

96. *Ibrahim Pillai v. Principal, University Intermediate College, Trivandrum*, A.I.R. 1958 72.

97. *Nagendra Nath v. Commissioner, Hills Division and Appeals, Assam*, A.I.R. 1958 S.C. 398.

98. *Ram Kishen Tandon v. Central Bank of India*, A.I.R. 1958 All. 413.

99. (1845) 6 Q.B. 721 and (1892) 2 Q.B. 21.

100. *Ashraf Ali Khan v. State of W.B.*, A.I.R. 1958 Cal. 210

adopted was unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the Sales Tax department concerned. The order of assessment was quashed¹. It is not not open to a party for the first time in certiorari proceedings to raise the question of jurisdiction of the subordinate tribunal unless he had challenged the jurisdiction before that tribunal itself or satisfied the court that he was unaware of the circumstances which would put him on an enquiry as to the lack of jurisdiction of the subordinate tribunal².

In making a reference under Sec. 10 (1), Industrial Disputes Act of 1947, the appropriate Government is only doing an administrative act. That being so, it would be more appropriate to issue a writ of mandamus against the State Government in respect of a notification issued by it under Sec. 10 (1) which is found to be invalid and *ultra vires* than issuing a writ of certiorari against the State Government quashing the impugned notification³.

Though administrative orders cannot be quashed by a writ of certiorari such orders can be quashed by the court in exercise of the general powers conferred upon it under Art. 226 to issue direction and orders³⁰. Thus an order passed without jurisdiction which adversely affects the petitioner ought ordinarily be set aside⁴.

The decision of a 'domestic' tribunal can be interfered with by the court under Art. 226 only when the tribunal had no jurisdiction or it did not follow the principles of natural justice or did not act in good faith or did not act according to its own rules⁵.

Where the Industrial Tribunal applies model standing orders in the case of dismissal of employees in an establishment engaging less than 100 workers and the case is not approached from a correct angle it is a case where there is an obvious mistake patent on the face of the record and it is well established that in such a case writ of certiorari can issue to quash the order and a mandamus can issue directing the court to proceed according to law and make a further investigation⁶. There are four prerequisites for the issue of mandamus⁷. (1) whether the petitioner has a clean and specific legal right to the relief demanded by him, (2) whether there is a duty imposed by law on the respondent, (3) whether that duty is of an imperative ministerial character involving no judgment, or discretion on the part of the respondent, and (4) whether the petitioner has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

When the ground taken against an assessment order is that the course taken by the Income Tax Officer in making orders of fresh assessment under Sec. 34 is irregular and illogical and therefore it should be corrected, it relates to the merits of the order and does not raise any question of jurisdiction under Art. 226⁸.

1. *Mahodayal Premchand v. Commercial Tax Officer*, A.I.R. 1958 S.C. 667.

2. *N. Gopalan, v. Central Road Traffic Board, Trivandrum*, A.I.R. 1958 Ker 341, relies on A.I.R. 1953 All. 624.

3. *State of Bihar v. D.N. Ganguly*, A.I.R. 1958 S.C. 1018, relies on A.I.R. 1953 C. 53; 1953 S.C.J. 39.

4. *Sunni Central Wakf Board v. Intizar Hussain*, A.I.R. 1959

All. 16, relies on A.I.R. 1952 All. 752 1954 All. 144.

5. *Oynam Mirahari Singh v. Inspector of Schools, Manipur*, A.I.R. 1959 Manipur 1.

6. *Malabati Tea Estate v. Bhakta Munda*, A.I.R. 1959 Tripura 8.

7. *The Karnal Kaithal Cooperative Transport Society Ltd. v. The State of Punjab*, A.I.R. 1959 Punj. 75.

8. *Narayana Chetty v. I. T. Officer*, A.I.R. 1959 S.C. 218.

A Full Bench of the Bombay High Court⁹ has held that the jurisdiction of the High Court is confined to issuing writs only to those persons and authorities which are within its territorial jurisdiction. In the instant case³⁵ a writ was sought against the state of Madhya Pradesh. The application was admitted by the Nagpur High Court which was later transferred to Bombay High Court under Sec. 59, States Reorganization Act. Sec. 59 (5) limits the fiction as a result of which the latter High Court was bound to respect only the order admitting the petition by the Nagpur High Court. That sub-section does not introduce any fiction as to the order which the court must pass for doing which it might be necessary to assume that on the day on which the order is passed the State of Madhya Pradesh is within its jurisdiction. Sec. 59 (5) is not an extension of the jurisdiction of the High Court of Bombay under Art. 230 so as to permit the High Court to issue writs under Art. 226. Further Art. 230 postulates the law with certain element of permanence and continuance. Sec. 59 (5) is intended only for a particular emergency. The court therefore struck off the first two respondents from the array of parties, and the petition against the third Respondent the State of Bombay was directed to be disposed of according to law.

The relief which can be granted under Art. 226 is very much wider than the relief which a court of King's Bench in England could give by issue of prerogative writs¹⁰. Where two different dates of birth were entered in the Railway Company's Service Register and he was ordered to retire according to earlier date, the order was held³⁶ not judicial but administrative. Hence a writ of mandamus was the appropriate relief.

In *Velusami v. Raja Nainar*¹¹ the Supreme Court has reiterated the principle that though it is well settled that the High Court has jurisdiction to issue writs against orders of tribunals yet when there is another remedy open, the court may properly exercise its discretion in declining to interfere under Art. 226.

No doubt the rule that costs should follow the event would apply even to proceedings under the writ jurisdiction unless of course some special reason can be shown for making an order otherwise³⁸. But an order for costs is one thing and the order of costs which is really an order for damages independently of the conduct of the suit or proceeding is quite another matter. In a mandamus proceedings it is not proper that a decision on the question of damages which the petitioner may eventually suffer should be given¹².

When there is an appeal remedy against order of Sales Tax Officer which is adequate it is not proper to resort to Art. 226¹³.

The decision arrived at by the appropriate Customs Officer under Sec. 167 (8) of the Sea Customs Act is quasi judicial liable to correction by a writ of certiorari¹⁴.

Errors apparent on the face of the record are always treated as errors of jurisdiction for purposes of quashing and for issuing a writ of certiorari¹⁵.

9. *Dr. Surju Prasad Gumasta, v. State of M. P.*, A.I.R. 1959 Bom. 122.

10. *C. Ambalam, v. S. Jagannatha*, A.I.R. 1959 Mad. 88.

11. A.I.R. 1959 S.C. 422.

12. *Board High School, & Intermediate Education v. Ram Krishna*, A.I.R. 1959 All. 226.

13. *Official Liquidator v. Shri Krishna Rao*, A.I.R. 1959 All. 246.

14. *N. S. Chetty v. Collector of Customs*, A.I.R. 1959 Mad. 142.

15. *Messrs. J. N. Prusty & Bros. v. State of Orissa*, A.I.R. 1959 Orissa 79.

In such a case the objection that there is another remedy open to the petitioner by way of appeal under the provisions of law cannot stand⁴¹.

(2) ARTICLE 32.

In *Express Newspapers Ltd. v. Union of India*¹⁶ the Supreme Court has held that the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, cannot be challenged as violative of the fundamental right enshrined in Art. 32 of the Constitution. It may be the contrary if there was any provision to be found in the impugned Act which prevented the Wage Board from giving reasons for its decisions. In such an event it might be construed to mean that the order which was thus made by the Wage Board could not be a 'speaking order' and no writ of certiorari could then be available as a remedy. But the impugned Act in the instant case³⁹ does not say that the Wage Board shall not give any reasons for its decision. It is left to the discretion of the Wage Board whether it should give the reasons for its decisions or not. In the absence of such prohibition it is impossible to hold that the fundamental right conferred under Art. 32 was in any manner infringed.

It is well settled law that an alternative relief is no bar to resort to Art. 32 when there is a breach of the fundamental right guaranteed by the Constitution or where there is an utter disregard of the statutory right conferred on the subject by the statute¹⁷.

In *G. Nageswara Rao v. Andhra Pradesh State Road Transport Corporation*¹⁸ an application under Art. 32 was presented for enforcement of the petitioner's right to carry on the business of motor transport in a particular area and for prohibiting the respondent State Corporation from taking over the routes on which the petitioners had been plying their stage carriages. The Supreme Court however turned down the contention that the cancellation of the petitioner's permit was deprivation of his property in business under Art. 19 and as acquisition of business by the State was without payment of compensation the order of the State in cancelling the petitioner's permit violated Art. 31 (2). For cancellation of permit is not acquisition. The new permit to the Corporation is quite independent of the business of the petitioner and no question of transfer of business arose. But the Supreme Court in the instant case⁹² by a majority opinion delivered by Subba Rao, J., held that as the enquiry made under Chapter IV-A of the Act (Sec. 68-D) was quasi judicial and in this instance was violative of the rules of natural justice, the order approving the scheme for a State Corporation was quashed and the State Government was free to make a fresh enquiry in accordance with law. But the dissenting judges, Wanchoo and Sinha, J. J., opined that the enquiry was not quasi judicial but merely administrative and that the court could not interfere at all in the matter.

Quasi Judicial v. Administrative.

The question whether the enquiry was quasi judicial or not is a matter worthy of some consideration. The majority (S. R. Das, C.J., N. H. Baghawati and Subba Rao, JJ.,) stated, "Whether an administrative tribunal has a duty to act judicially should be gathered from the provisions of the particular statute and rules made thereunder and if an authority is called upon to decide respective

16. A.I.R. 1958, S.C. 578.

17. *Shiv Dass v. The State*, A.I.R. 1958 J. and K. 13, relying on A.I.R. 1953 S.C. 252, A.I.R.

1952 Cal. 656 and A.I.R. 1955 All. 635.

18. A.I.R. 1959 S.C. 300.